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No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DUCHESNE COUNTY, a political subdivision of the State of Utah, UINTAH COUNTY, a political subdivision of the State of Utah,

Petitioners,

v.

UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah, a federally recognized tribe of Indians,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of this Court in *Hagen v. Utah*, 510 U.S. 399 (1994) has been misconstrued to preserve historic reservation boundaries in Utah that encompass hundreds of thousands of acres of *fee* lands, contrary to:

(i) Twenty years of express representations by the parties and *amici* in the *Ute Indian Tribe* and *Hagen* litigation, which conceded that the reservation would consist of only *trust* lands if the public domain language of the acts was implemented (as this Court held in *Hagen*), and

(ii) Thirty-five years of express representations by the parties and *amici* in all other related litigation, which similarly conceded that other affected reservation areas would also consist of only *trust* lands if the reservation areas were, in fact, diminished, as this Court recognized in *Hagen*. *Seymour, Mattz, DeCoteau, Rosebud, Solem,* and *Hagen,* and

(iii) Any practical consideration when Respondent Tribe has conceded that implementation will be completely unworkable and unprecedented ("jurisdictional chaos"), and

(iv) Any consideration of comity because an injunction will be said to preclude the Supreme Court of the State of Utah (and the parties and all others) from expressing their views on *Hagen,* in spite of the fact that the Utah Supreme Court was *affirmed* in *Hagen*.

2. Whether the precedential scope of the decision of this Court in *Hagen v. Utah*, 510 U.S. 399 (1994), has been improperly restricted on "finality" principles by the court of appeals, which summarily precluded any further consideration, in light of *Hagen,* of the status of the original Uncompahgre reservation and the national forest, which were issues *in pari materia* in the *Ute Indian Tribe* litigation:

(i) When the district court expressly stated that it did "not reach any question" regarding the status of these areas, "[t]hese questions await another day," and

(ii) When the United States specifically conceded that, in its view, the historic Uncompahgre reservation no longer exists (and it is no longer inhabited by any tribal member), and when an injunction precludes comity considerations.

LIST OF PARTIES

Petitioners are Duchesne County, Utah and Uintah County, Utah, political subdivisions of the State of Utah. They were defendants in the original action.

Respondent Ute Indian Tribe of the Uintah and Ouray Reservation, is a federally recognized tribe of Indians. It was the plaintiff in the original action.

The State of Utah appeared as a defendant in the original action and Roosevelt City, Utah, and the City of Duchesne, Utah, municipal corporations, appeared as defendants in the original action.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Duchesne County, Utah, and Uintah County, Utah, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled proceeding on May 8, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 114 F.3d 1513 (10th Cir. 1997) and is reprinted at 1a-36a. The opinion of the federal district court for the district of Utah is reported at 935 F.Supp. 1473 (D.Utah 1996) and is reprinted at 37a-157a. A copy of the denial of Petition for Rehearing and Suggestion for Rehearing *En Banc* of Defendants/Appellants Duchesne County, Utah, and Uintah County, Utah, issued July 1, 1997, appears at 158a-159a.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on May 8, 1997. The Counties' Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on July 1, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Act of May 27, 1902, ch. 888, 32 Stat. 245; Act of March 3, 1905, ch. 1479, 33 Stat. 1048. Copies of these Acts appear at 160a-161a and 161a-164a respectively.

STATEMENT OF THE CASE

Introduction. The issue in this litigation centers around efforts to implement the mandate of the 1994 decision of this Court in *Hagen v. Utah,* 510 U.S. 399 (1994) in the State of Utah. To date, these efforts have been successful only in part and even that success was not effective until just days ago, an incredible three years and seven months after *Hagen* was decided. *Ute Indian Tribe v.*

Utah, No. 75-CV-408-J (D. Utah Sept. 15, 1997) (Order vacating injunction as to Roosevelt City, Utah).

In all other respects, the balance of the *Hagen* decision has been seriously misconstrued, impermissibly narrowed and effectively *still* held in abeyance. As a result, not only has a mandate of this Court been frustrated, but the misconstruction of *Hagen* promises consequences that even Respondent Tribe describes as nightmarish, and not just in the State of Utah, but throughout former reservation areas across the United States. *See* Br. for the Pet'r. at 2 n.2, Br. of Charles Mix County, S.D. in Supp. of Pet'r. at 30 n.11, Br. of Duchesne County, Utah and Uintah County, Utah in Supp. of Pet'r. at 1-2, *Yankton Sioux Tribe*, (No. 96-1581). *Hagen* was not intended to cause this result.

Over four years ago, this Court granted certiorari in *Hagen* to resolve a direct conflict between decisions of the Tenth Circuit Court of Appeals and the Supreme Court of Utah. Previously, in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985), (en banc) *cert. denied*, 479 U.S. 994 (1986), the Tenth Circuit concluded, in a divided *en banc* opinion, that the original boundaries of the Uintah reservation had *not* been diminished. In *State v. Hagen*, 858 P.2d 925 (Utah 1992) and *State v. Perank*, 858 P.2d 927 (Utah 1992), however, the Supreme Court of the State of Utah reached the *opposite* conclusion.

In *Hagen*, this Court considered those competing arguments and concluded that the Uintah reservation had in fact been *diminished*, in accordance with the views of the Supreme Court of the State of Utah. *Hagen*, 510 U.S. at 421-422.[1]

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[1] Other panels of the Tenth Circuit subsequently recognized, in passing, the extent to which *Hagen* completely undermined the holding and rationale of *Ute Indian Tribe*. *United States v. Cuch*, 79 F.3d 987, 989 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 384 (1996) ("effectively overruled") and *Gardner v. United States* at 5 n.4, No. 93-4102 (10th Cir. May 5, 1994) (unpublished order and judgment) ("issue was recently resolved"). *See also United States*

1. Federal District Court. From the beginning, in the State of Utah, however, the issue was presented to the federal district court in a most unusual manner. Immediately after the slip opinions were first released by the Supreme Court of the State of Utah in *Perank* and *Hagen*, the Ute Tribe "reopened" the earlier *Ute Indian Tribe* case by filing a motion in the federal district court in Utah, in this case, for injunctive relief against the State and local governments. This motion was filed pursuant to a claimed exception to the Anti-Injunction Act, 28 U.S.C. § 2283. *Ute Indian Tribe v. Utah*, 935 F.Supp. 1473, 1482 (D.Utah 1996), App. 44a. The motion sought to permanently enjoin the Utah Supreme Court from entering as final its decision in those cases, and to enjoin the State and its political subdivisions from enforcing or relying upon those decisions in any way. *Id.* The Tribe simultaneously sought a temporary restraining order or preliminary injunction having the same effect. *Id.* at 1482, App. 44a. The United States, as *amicus curiae*, unequivocally supported the Tribe's position.[2] The entire matter in the federal district court was assigned to the Honorable Chief Judge Bruce S. Jenkins, whose earlier views on the same

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v. Duncan, 857 F.Supp. 852 (D.Utah 1994). (And even before *Hagen*, the panel in *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990) noted some fundamental problems with *Ute Indian Tribe*, as this Court subsequently recognized). *Hagen*, 510 U.S. at 414.

[2] Although the United States told this Court in 1986 in *Ute Indian Tribe* that there would be time enough another day for the Utah Supreme Court to express its views, when they were suggesting, in support of the Ute Tribe, that certiorari be denied, the United States now told the federal district court another story. Br. for the United States as *Amicus Curiae* at 15, *Ute Indian Tribe*, 479 U.S. 994 (1986) (No. 85-1821). *See also State v. Perank*, 858 P.2d 927, 931 (Utah 1992). In this new Department of Justice brief, the State of Utah's activity was described as "intolerable and dangerous" and the United States said it "must be enjoined." United States' Mem. as *Amicus Curiae* in Supp. of Ute Indian Tribe's Mot. for Injunctive Relief at 6, *Ute Indian Tribe v. Utah*, (D.Utah, Nov. 23, 1992) (No. C-75-408-J).

subject in *Ute Indian Tribe* had just been rejected by the Utah Supreme Court. *See generally Perank*, 858 P.2d at 927.

In August, 1992, the State and local defendants and the Ute Tribe, through counsel, entered into a stipulation for the entry of injunctive relief pending the decision of the district court on the Ute Tribe's motion for permanent injunctive relief. The stipulation by its terms was to expire on the day after the district court issued its decision on the Tribe's motion for injunctive relief. *Ute Indian Tribe*, 935 F.Supp. at 1482, App. 44a. The district court issued an Order ("Injunctive Order") incorporating the parties' stipulation concerning injunctive relief on September 2, 1992, *nunc pro tunc* to August 3, 1992. *Id.* at 1482, App. 44a.

In the ensuing months, the district court vacated several previously scheduled hearings on the Tribe's motion for injunctive relief pending this Court's consideration of the certiorari petition in *Hagen*, and subsequently pending this Court's decision on the merits. *Id.* at 1482-1483, App. 45a. (The injunction and the proceedings in the district court were specifically brought to the attention of this Court in *Hagen*.)

On February 23, 1994, this Court decided *Hagen*, affirming the decisions of the Utah Supreme Court and ruling that the Uintah reservation had been diminished for jurisdictional purposes. A petition for rehearing was denied by this Court on April 18, 1994. *Hagen v. Utah*, 511 U.S. 1047 (1994).

The next week, on April 25, 1994, the State and local defendants promptly filed a motion in the federal district court to vacate and set aside the Injunction Order, and to dismiss the Ute Tribe's motion for permanent injunctive relief. *Ute Indian Tribe*, 935 F.Supp. at 1483, App. 46a. After a United States Magistrate dismissed a federal prosecution of an Indian for crimes occurring in Roosevelt, Utah, on the basis that *Hagen* had held that such

prosecutions were a state responsibility, the State and its subdivisions also moved the federal district court for an Order at least modifying the Injunction Order to permit immediate state prosecution within the former reservation boundaries.

In May, 1994, the district court temporarily modified the Injunction Order to permit the State and local defendants to prosecute *felony* crimes occurring on lands within the original boundaries of the Uintah Reservation which were not "Indian country" as defined by 18 U.S.C. § 1151 *et seq.* *Id.* at 1483, App. 46a. The district court's modification was without prejudice to the collateral estoppel claims of the Tribe, and did not determine the Indian country status of particular lands. *Id.*

In September, 1994, prior to hearing oral arguments on the pending motions, the district court entered its Pre-Trial Order, based upon a stipulation between the Ute Tribe and the State and local defendants. *Id.* at 1484, App. 48a. The Pre-Trial Order provided, *inter alia,* that lands that had been opened and settled pursuant to federal homestead laws were not Indian country pursuant to 18 U.S.C. § 1151, as *Hagen* held. The district court's stipulated finding that homesteaded lands were not Indian country was subject to the Ute Tribe's contention that the State and local defendants were collaterally estopped by *Ute Indian Tribe* from reliance on *Hagen.* *Id.* at 1484, App. 49a. With the case in this posture, the injunction was still in effect in spite of *Hagen,* with the limited exception noted above.

Finally, after twenty-five months, in April, 1996, the district court issued a ninety-six page Memorandum Decision in connection with the pending motions. *Id.* at 1473, App. 37a-157a. Even after two years, the district court *declined to rule* on the merits of the Tribe's motion for injunctive relief and the State's motion to dissolve the Injunction Order. The district court instead *continued* the Injunction Order in full force and effect, even while recognizing that "Indian country" did not include "unallotted

and unreserved lands of the Uintah Reservation that were opened to entry in 1905, to the extent that those lands were not later restored to tribal ownership." *Id.* at 1531, App. 152a. This Memorandum Decision had the effect of continuing to permit certain State felony prosecutions of Indians, but it *continued* the injunction in effect as to all misdemeanor prosecutions of Indians and exercises of civil jurisdiction within the historic reservation boundaries, even in areas the district court held to be outside Indian country.

Further, adopting verbatim a new post-*Hagen* argument submitted by the Ute Tribe with the support of the United States, *amicus curiae*, the district court also held that historic reservation boundaries persist despite *Hagen* and encompass *all* fee lands in the area except for homestead lands. For nearly two decades, the Ute Tribe and the United States had told everyone, including the federal district court (and this Court), exactly the opposite story —*that unless they were successful in the diminishment/disestablishment litigation, the reservation would consist of only trust lands* (still a million plus acre reservation). The State and local governments proceeded on the basis of the same assumption because that was the only assumption supported by three and one-half decades of precedent from this Court and all lower courts.

For this reason, the new post-*Hagen* argument adopted by the district court is unprecedented in this type of litigation and unprecedented in procedural and practical complexity. First it is unprecented in this type of litigation because no other fee lands in similar diminished/disestablished areas in the United States are within the limits of Indian reservations. *Seymour v. Superintendent,* 368 U.S. 351 (1962); *Mattz v. Arnett,* 412 U.S. 481 (1973); *DeCoteau v. District County Court,* 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977); *Solem v. Bartlett,* 465 U.S. 463 (1984) and *Hagen v. Utah,* 510 U.S. 399 (1994) were all argued and described on the basis of this understanding, and correctly so. Secondly, it is unprecedented in procedural and practical com-

plexity in that a parcel by parcel *title* search will now be required, in every instance, to determine jurisdiction under this new post-*Hagen* argument. In the past, simple *tract* identification sufficed.

Lastly, the district court also expressly held that it "need not" and did "not reach any question" regarding the present status of the Uncompaghre reservation or the lands withdrawn for national forest purposes. According to the district court, "[t]hose questions await another day." *Ute Indian Tribe,* 935 F.Supp. at 1528, App. 146a. Of course, in the interim, the re-established reservation status of these areas as set forth in the 1985 *Ute Indian Tribe* decision would continue.

In connection with the Memorandum Decision, the district court also filed a Certificate and Request for Further Instructions ("Request") directed to the United States Court of Appeals for the Tenth Circuit. *Id.* at 1531, App. 154a. In the Request, the district court noted the direct conflict between the court of appeals' mandate in *Ute Indian Tribe,* which held that all lands within the historic reservation boundaries were Indian country, and the decision of this Court in *Hagen,* which held that those boundaries had been diminished for jurisdictional purposes. *Id.* The district court requested further instructions in light of this conflict, and indicated that the court of appeals could "construe this court's request for instructions as an invitation to recall its own mandate for further consideration." *Id.* at 1533, App. 157a.

On April 12, 1996, the State and local defendants filed their Notice of Appeal from Judge Jenkins' decision continuing the Injunction Order in effect, pursuant to 28 U.S.C. § 1292(a)(1). *Id.* at 1531, App. 153a.

2. Court of Appeals. With the mandate in *Hagen* restricted in this fashion by the injunction, which continued in force and effect as noted above, the court of appeals, on its own motion, expedited the appeal by Order dated April 30, 1996. *Ute Indian Tribe v. Utah,* 114 F.3d 1513 (10th Cir. 1997), App. 1a. Briefing was completed in

short order and oral argument submitted on September 10, 1996.[3] Eight months later, the panel affirmed the district court in all substantial respects.

Although the panel did reject the Ute Tribe's collateral estoppel argument limiting *Hagen's* viability, the *Ute Indian Tribe* mandate was modified only to exclude homesteaded land. In essence, the court of appeals also adopted the new post-*Hagen* argument of the Ute Tribe and the United States. *Not a single case was cited as precedent for this position.*

For some reason, the panel also summarily decided to further restrict the precedential scope of *Hagen* with respect to the Uncompaghre reservation and the national forest lands. *Id.* at 1530-1531, App. 35a-36a. Without even mentioning that the district court expressly held that it "need not" and did "not reach any question" regarding the status of these areas ("those questions await another day"), the panel ruled that principles of "finality" required continued recognition of the reservation status acknowledged in the first instance in 1985 in *Ute Indian Tribe*. In the process, the panel said nothing about the significant concession by the United States (made after *Ute Indian Tribe* and presently reiterated before the court of appeals) that the Uncompahgre reservation *no longer existed* in its view for a number of important reasons.[4] In the final analysis, the court of appeals acknowledged that even a "misreading of the applicable legislation" would not "justify departing from our earlier judgment." *Id.* at 1529, App. 31a.

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[3] The panel consisted of Circuit Judge, Deanell R. Tacha and Senior Circuit Judge, William J. Holloway, Jr. of the Tenth Circuit and Senior Circuit Judge, John C. Godbold of the Eleventh Circuit sitting by designation.

[4] These reasons, which have previously been brought to the attention of this Court on more than one occasion, also include the general observation that not a single tribal member resides anywhere within the original million plus acre "reservation" area.

A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed by Duchesne County, Utah and Uintah County, Utah on June 11, 1997. That petition was denied on July 1, 1997.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE DECISION OF THIS COURT IN *HAGEN* HAS BEEN MISCONSTRUED TO PRESERVE HISTORIC RESERVATION BOUNDARIES CONTRARY TO SUBMISSIONS IN *HAGEN* AND CONTRARY TO RELATED PRECEDENT OF THIS COURT.

A. The Post-*Hagen* Argument Removes From Indian Country Status Only Those Lands Ceded, Restored to the Public Domain, or Otherwise Directly Affected, Leaving Historic Reservation Boundaries Intact.

The Counties want to primarily direct the Court's attention to the new argument submitted below by the Ute Tribe and the United States that is premised on an overly restrictive view of the decision of this Court in *Hagen*. According to this new post-*Hagen* argument, even if an act was intended to diminish or disestablish a reservation or a portion thereof, it would remove from Indian country status *only* those lands ceded, restored to the public domain, or otherwise directly affected, leaving historic reservation boundaries *intact* so as to encompass all other *fee* lands in the same area.

This new post-*Hagen* argument of the Ute Tribe and the United States is based only on isolated sentences in the *Hagen* opinion, taken out of context and used in conjunction with "diminished" terminology to support a reservation concept that would have been unthinkable a century ago. This argument is pure sophistry, and it flies in the face of the submissions and decisions in *Seymour, Mattz, DeCoteau, Rosebud, Solem* and *Hagen*. In each and every one of these cases it was conceded that affected

reservation areas would consist of only trust lands if the reservation areas were, in fact, diminished.[5]

In addition, the Ute Tribe and the United States concede that after the post-*Hagen* argument is recognized, implementation will require *title* searches, instead of the routine fee/trust checkerboard identifications that have been in place for decades in these areas similarly situated. In a Petition for Rehearing in this Court in *Hagen*, the Ute Indian Tribe acknowledged that this scenario promised nightmarish consequences and would be completely unworkable. Br. of Ute Indian Tribe in Supp. of the Pet. for Reh'g at 1, *Hagen* (92-6281). *Hagen* does not support this argument. No decision of this Court supports this argument.

The Counties are in a favorable position to offer views in response to this novel argument of the Ute Tribe and the United States. As *amici curiae* participants in *Hagen* and *Hagen*-related litigation for almost two decades, the Counties are as familiar as the Ute Tribe and the United States with the submissions and the record in *Hagen* and similar cases. As this Court has noted, the argument is of more than just passing concern to the residents in these Counties. *Hagen*, 510 U.S. at 421.

B. Respondent Ute Tribe Has Conceded That Implementation of the Holding of the Tenth Circuit Will Be Completely Unworkable and Unprecedented.

Subsequent to the decision of *Hagen*, the Ute Tribe attempted to submit an *amicus curiae* brief in support of the petition for rehearing in this Court. The Court did not allow the *amicus* brief to be filed. Counsel for Petitioner in *Hagen* thereafter promptly resubmitted the same text under the caption of a Motion to Supplement Petition

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[5] The same argument ignores the fact that when trust title to an allotment is extinguished and passes into fee status, it would otherwise cease to be Indian country. 18 U.S.C. § 1151(c). *DeCoteau*, 420 U.S. at 427 n.2, 446-447. It also ignores special Utah acts and other federal Utah orders directed to fee lands, inconsistent with continuing reservation status.

for Rehearing. It was in this form that the new post-*Hagen* theory of what was really at issue in *Hagen* first surfaced. This Court denied the petition without comment.

The first problem with the new post-*Hagen* theory was that it squarely conflicted with the previous "disestablished" except for "trust" land arguments submitted by the parties. As a result, the Tribe simply did not mention this point. Secondly, apart from the apparent *dilemma* of attempting to present argument that counters traditional disestablishment/diminishment considerations and addresses disestablishment/diminishment precedent and issues in those terms (as the Ute Tribe did and continues to do to this day), while at the same time maintaining that disestablishment/diminishment in the sense of those cases was *never* really an issue, the substance of the motion is noteworthy in only one other respect.

In the process of telling this Court that its decision in *Hagen* only excised the unallotted homestead land from the Uintah reservation, leaving the historic reservation boundary otherwise intact (according to the new post-*Hagen* theory), the Ute Tribe submission makes one *critical* concession. This concession, in the Counties' view, is telling here insofar as practical considerations have any role in this process.

According to the Ute Tribe admission, if this *new post-Hagen theory* were really the holding of *Hagen,* "consistent law enforcement" and the "administration of civil laws" would be "*virtually impossible*" throughout the entire area. Br. of Ute Indian Tribe in Supp. of the Pet. for Reh'g at 4, *Hagen,* (92-6281). We agree. Similarly, according to the Ute Tribe submission, it would also be "virtually impossible to bring any continuity or organization to such regulatory activities as zoning, liquor regulation and taxation." *Id.* We also agree. In addition, the Ute Tribe submission goes on to assert that:

> The *jurisdictional chaos* is further increased because, within the townsites established under the 1905 Presidential Proclamation, the lots that had not been pur-

> chased were restored to the Tribe by the 1945 Restoration Order. Thus, the State may have jurisdiction over one lot, but the Tribe and United States may have jurisdiction over the lot next door. Conceivably, a store within a townsite or Roosevelt City could be located on two lots—one a former homestead and one a former allotment or parcel restored to the Tribe. Under such circumstances, the majority's decision [*Hagen*] [new post-*Hagen* theory] could result in the *absurd situation* of a tribal member being subject to or exempt from paying State sales taxes depending on the location within the store of the item purchased.

Id. at 4-5 (emphasis added) (footnote omitted).

Importantly, the Counties further agree with the hypothetical conclusion in this argument. As the Ute Tribe stated:

> If all of the non-trust lands had been disestablished from the Reservation, as Utah implied, jurisdictional determinations would require a tract book search to discover the *trust/non-trust* status of the land [*DeCoteau* and *Rosebud*]. However, given the various categories of land existing on the Reservation, under the majority's decision [*Hagen*] [new post-*Hagen* theory] jurisdictional determinations will require a tract-by-tract *title search* in order to ascertain whether a particular site is homestead land, former allotment land now in fee status, land restored to tribal ownership under the 1945 Restoration Order, land partitioned under the Ute Partition Act, present allotted land or tribal trust land.

Id. at 3-4 (first emphasis added).

In this instance, the Ute Tribe submission is absolutely correct. To the extent that *Hagen* represents disestablishment/diminishment in the traditional sense, only trust lands are Indian country under 18 U.S.C. § 1151(c). In this situation, trust tract searches are occasionally necessary. Of course, this result was approved in *DeCoteau* and *Rosebud* for the reasons there stated. *DeCoteau*, 420 U.S. at 427 n.2, 429 n.3, 446-447. *Rosebud*, 430 U.S.

at 584. *See also Yazzie*, 909 F.2d at 1421-22. And in the decades since the decision of this Court in *United States v. Pelican*, 232 U.S. 442 (1914), no significant problems have arisen anywhere.

However, to the extent that anyone accepts the new post-*Hagen* theory adopted by the court of appeals, a complete title search would be necessary for each and every arrest on fee lands throughout entire areas to determine if the ultimate source of title was actually homesteaded land. Because the vast majority of all crimes are committed on these fee lands (population centers, highways, and so forth) "jurisdictional chaos" would truly result. And the administration of civil laws would truly be "virtually impossible," as the Ute Tribe stated.

Notwithstanding the views of the federal district court, it is difficult to believe that any panel of any circuit familiar with the actual administration of "Indian country" issues would accept this post-*Hagen* argument (even without the admissions of the Ute Tribe). That the Tenth Circuit would do so, in light of these admissions, and say that *Hagen* required this result is truly perplexing. And the explanation by the panel clarifies nothing with respect to the "jurisdictional chaos" acknowledged by the Ute Tribe:

> We note that this conclusion has the benefit of producing a stable, unchanging allocation of jurisdiction. Under our approach, the Tribe and the federal government retain jurisdiction over all trust lands . . . *and* the three categories of *non-trust lands* [fee lands] that remain within the boundaries of the Uintah Valley Reservation. The state and local defendants have jurisdiction over the fee lands removed from the Reservation under the 1902-1905 allotment legislation. Although a *title* search may be necessary to determine which lands were opened under the 1902-1905 legislation, the parties' respective jurisdictions will never change once the status of those lands is conclusively determined. By contrast, under the defendants' theory (i.e. that Indian country is limited to trust lands) the Indian country status of land would change as trust lands are transferred into fee

> lands. We recognize that while our approach might result in a checkerboard allocation of jurisdiction, such a result is more desirable than the defendants' approach, which would produce a "moving checkerboard" because lands leaving trust status would also lose their status as Indian country.

Ute Indian Tribe, 114 F.3d at 1530 (emphasis added), App. 35a.

"That Indian country is limited to trust lands" is something more than just "defendants' theory." The acts of Congress that have defined "Indian country" and the decisions of this Court that have interpreted those acts should have played some role in the process. Under this "approach" they did not. The panel should have squarely rejected the new post-*Hagen* argument.[6]

C. The Misreading of the *Hagen* Opinion Has Far-Reaching Consequences.

The legal issues are relatively straightforward with respect to the post-*Hagen* argument. Nevertheless, for over 25 months, the district court in Utah, at the urging of the Ute Tribe and the United States, resisted the mandate of this Court, and then issued a ninety-six page Memorandum Opinion that wholly obscures an otherwise fairly simple question. *Ute Indian Tribe*, 935 F.Supp. 1473, App. 37a-

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[6] To the extent that the panel's latest decision summarily precludes any reconsideration regarding the status of the Uintah National Forest or the original Uncompahgre reservation (as mistakenly set forth in *Ute Indian Tribe*, 773 F.2d at 1089-1093) because of "finality" principles, it is in further conflict, in principle, with *Hagen*. Considering the very significant observation of this Court in *Hagen* that the Tenth Circuit's en banc opinion altered *decades* of "justifiable expectations," *Hagen*, 510 U.S. at 421, the balance of the panel's latest opinion regarding "finality" does not really ring true. In addition, the views of the panel in this respect do not reflect any consideration of contrary views noted in decades of previous federal and state opinions noted by this Court in *Hagen*. Because the district court refused to address the national forest and the original Uncompahgre issues, *Ute Indian Tribe*, 935 F.Supp. at 1530, App. 150a, the panel should not have rushed to judgment on this question and it should not have precluded the Utah Supreme Court from expressing its views.

157a. In *Hagen*, this Court squarely rejected the previous views of the Ute Tribe and the United States and the same district court specifically with respect to the status of the original Uintah reservation. Now, the Ute Tribe and the United States and the same district court have somehow convinced a panel of the Tenth Circuit that, in the process, this Court granted certiorari only to fashion a very limited opinion in *Hagen*, but that *Hagen* also created a jurisdictional nightmare in practical terms. This is clearly not the case.

According to this novel argument, this Court intended *Hagen* to *undermine* the most basic premise of all previous disestablishment/diminishment decisions: namely, that surplus land statutes either disestablished original reservation boundaries and left remaining trust land as Indian country/reservation, or they did not.

Yet, it was because of a recognition of this fundamental premise that the Ute Tribe told this Court in *Hagen*:

> [T]he Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, *finding* that the Reservation consists only of those lands held in *trust* by the United States for the Tribe or individual Indians . . . . if this Court were to alter the boundaries of the Reservation. Such a judgment would *reduce* the Reservation by almost *three million* acres and *deprive* the Tribe and the United States of all civil and criminal jurisdiction over the *non-trust lands* of the Uintah Valley portion of the Reservation.

Mot. of Ute Indian Tribe to Intervene as a Matter of Right at 4-5, 7, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281) (emphasis added) (footnote omitted).

The United States told this Court essentially the same thing.

Later, the Ute Tribe and the United States adopted the novel position noted *supra*, which instead assumes that in addition to the trust land, a substantial amount of non-Indian fee land is still within original reservation boundaries which this Court in *Hagen* intended to leave intact.

The post-*Hagen* argument is completely untenable. It is contrary to what the Ute Tribe and the United States repeatedly told this Court. *And not a single case can be cited in support of this proposition.*

To argue that this Court would adopt such a radical departure in its disestablishment/diminishment precedent, without even mentioning that fact in the text of the *Hagen* opinion, is pure sophistry. This analysis also expressly conflicts with other precedent the Court repeatedly cited throughout the *Hagen* opinion. Apparently, the panel failed to clearly see what the district court was actually suggesting and in so doing adopted a position that is unworkable and unprecedented ("jurisdictional chaos").

As a result, *the decision in this case is the first case in the history of this type of litigation* to leave substantial non-Indian fee lands within original reservation boundaries *after an area had been restored to the public domain* —in other words, after the area had been the subject of this type of a disestablishment surplus land statute.

If the panel had addressed, or at least noted, that portion of the *Hagen* opinion that set forth Inspector McLaughlin's "picturesque phrase" with special emphasis, it could not have recognized any such reservation boundary:

> Contemporary historical evidence supports our conclusion . . . . Inspector McLaughlin explained the effect of these recent developments to the Indians living on the Reservation. . . . " 'You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation.*' " . . . Inspector McLaughlin's picturesque phrase reflects the contemporaneous understanding. . . .

Hagen, 510 U.S. at 416, 417 (quoting and adding emphasis to Minutes of Councils Held by James McLaughlin,

U.S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, From May 18 to May 23, 1903).

This Court in *Hagen* set forth this quote in the text of the *Hagen* Opinion in support of its "*conclusion*," including the *bracketed language* and the *added emphasis.* With "no outside boundary line to this reservation," all related precedent in this Court dictated that the diminished reservation "boundary" would coincide with the trust lands in the area, as the Ute Tribe and the United States recognized and told this Court at the time, as noted above. *Id.* Fee lands could not possibly still be within Indian country/reservation, as the panel has now erroneously concluded. *Ute Indian Tribe,* 114 F.3d at 1530-1531, App. 35a-36a.

Inspector McLaughlin's "picturesque phrase" ("pull up the nails . . . outside boundary") also establishes the proper historical perspective from which the new arguments of the Ute Tribe and United States should have been viewed. This Court's bracketed language and added emphasis underscore the significance of the point and undermine the novel proposition: namely, the historic boundaries of the Uintah Valley Reservation continue to exist, even after a restoration of the area to the public domain, in such a manner as to encompass these other fee lands (predominately owned by non-Indians) as well as the National Forest.

As a result, despite the clear language of *Hagen* evincing a termination of the historic reservation boundaries, the panel did not enter a judgment consistent with the decision in *Hagen.* Instead, the panel accepted the novel argument which *preserves* the historic boundaries of the Uintah Reservation in spite of *Hagen.* Again, this unique argument not only contradicts nearly a century of disestablishment/diminishment case law, as noted above, it also contradicts prior submissions by both the Ute Tribe and the United States *throughout* the *Ute Indian Tribe* and *Hagen* litigation.

The Ute Tribe and the United States led the panel to believe that the disestablishment of the original reservation boundaries had not been at issue throughout this litigation. As we established, however, prior submissions of both parties vitiate such a contention. Indeed, the language employed by both parties makes clear that they were well aware that the real issue never changed: Whether the original reservation boundaries were disestablished—*trust* lands versus original reservation boundaries.

Consistent with this position, Utah Attorney General Jan Graham referred to a Map exhibit coded to trust land and boundaries and explained to this Court in oral argument:

> MS. GRAHAM: [T]he undisputed reservation, which is 1.2 million acres. . . . [I]n the undisputed reservation, in the *trust* lands, on the tribal lands at Fort Duchesne. . . . [T]here is a reservation there, a big one, 1.2 million acres . . . . because of course the reservation, the *trust* lands that are there now are unchallenged by the State and, of course, always have been. . . .

Tr. of Oral Argument at 37, 38, 45, *Hagen*, 510 U.S. 399 (1994) (No. 92-6281) (emphasis added).

This was the "diminished" reservation referred to by *Hagen*.

On the other hand, the Ute Tribe and the United States have now parlayed casual references by this Court and the parties to a "diminished" reservation, intended only to summarily describe this *trust* land, into an argument that assumes continuing historic reservation "boundaries" that encompass all non-Indian fee lands, except those actually homesteaded. The attention of this Court is warranted here to address this important and far-reaching misreading of *Hagen*.

The public domain restoration language of the Act which opened the reservation for settlement was directed to "all unallotted lands." As such, it was not intended to simply remove only those lands from reservation status.

Instead, this restoration extinguished the historic reservation boundaries.

Nor is there any question that the misreading of *Hagen* has other far-reaching consequences. It has already been pointed out that the United States has introduced a version of this argument in the Eighth Circuit in the case of *Yankton Sioux Tribe v. Southern Missouri Waste Mgmt.*, 99 F.3d 1439 (8th Cir. 1996), *cert. granted sub nom. South Dakota v. Yankton Sioux Tribe*, 65 U.S.L.W. 3814 (U.S. June 10, 1997) (No. 96-1581). *See* discussion *supra* at 2. The Counties here have also filed an *Amici Curiae* brief in that case that recounts, in some detail, the legal arguments that demonstrate the extent to which *Hagen* has been seriously misconstrued. Br. of Duchesne County, Utah and Uintah County, Utah, *Amici Curiae*, in Supp. of Pet'r., State of South Dakota, *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581) (August 7, 1997).[7]

Beyond that, it should also be noted that because the United States has not restricted the scope of the post-*Hagen* arguments to "public domain" restoration statutes (Yankton is a "cession" statute), the areas affected by all previous statutes could arguably be the source of even more litigation of this type. For example, the status of former allotments or other fee lands in the areas at issue in *Rosebud*, in *United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975) *cert. denied* 430 U.S. 982 (1977), in *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) (*per curiam*) *cert. denied*, 449 U.S. 905 (1980), or in any other similar

[7] In the brief on the merits to this Court in the *South Dakota* case, the United States never acknowledged support of the post-*Hagen* argument in the Tenth Circuit, or the fact that the United States had also submitted it in the Eighth Circuit in that case. No mention was made of any of this. Amazingly, however, in this same brief, the United States belittles the *Yankton* documentation for lack of specific references to disestablishment like the *Hagen* "no outside boundary" quotation—the very *Hagen* reference belittled by the United States and ignored by the court of appeals in the Tenth Circuit.

areas, deemed resolved for decades, could again be at issue. Nothing in *Hagen* can fairly be said to support this radical position.

D. This Court's Opinion in *Hagen* Does Not Support the Post-*Hagen* Argument.

This Court began its analysis in *Hagen* with a general observation:

> Our cases considering *operative* language of restoration have uniformly equated it with a congressional purpose to *terminate* reservation status.

Hagen, 510 U.S. at 413 (second emphasis added).

And the Court further stated:

> Likewise, in *DeCoteau* we emphasized the distinction between reservation and public domain lands: "That the lands ceded in the other agreements were returned to the public domain, *stripped of reservation status*, can hardly be questioned. . . . The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the 'public domain.'" 420 U.S., at 446 (emphasis added).

Id. at 413 (emphasis added).

The Court later set forth the following quotation in the text of the *Hagen* Opinion in support of its conclusion, including the bracketing and special emphasis:

> Contemporary historical evidence supports our conclusion. . . . Inspector McLaughlin explained the effect of these recent developments to the Indians living on the Reservation. . . . " 'You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation.*' " . . . Inspector McLaughlin's picturesque phrase reflects the contemporaneous understanding. . . .

Id. at 416-417 (quoting and adding emphasis to Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians at Uintah Agency, Utah, From May 18, to May 23, 1903).

In spite of these references to disestablishment precedent and to "terminate reservation status" " 'stripped of reservation status' " and " 'no outside boundary line to this reservation,' " the Ute Tribe and the United States now maintain that the result in *Hagen* does not support diminishment/disestablishment in any recognized sense. This argument seriously misconstrues *Hagen*.

At bottom, the sole basis of support for this argument is a narrow focus on two sentences in the *Hagen* Opinion, taken out of context, and viewed without any historical perspective whatsoever:

> In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act *diminished the reservation*.

Id. at 414 (emphasis added).

While the post-*Hagen* argument stresses the lack of reservation status "with respect to *those* lands," (rather than the lack of reservation status of the *area* affected) and "diminished the reservation" (as opposed to a *disestablished or terminated* the reservation description), it omits any reference to the "termination" description of *Ute Indian Tribe* in the very next sentence in *Hagen*. This sentence in the *Hagen* Opinion *undermines* both points and with them, the entire foundation for the novel post-*Hagen* argument.

In context, *Hagen* states:

> In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect

> to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation. Indeed, we have found only one case in which a Federal Court of Appeals decided that statutory restoration language did not *terminate a reservation*, *Ute Indian Tribe*, 773 F.2d, at 1092, a conclusion the Tenth Circuit has since disavowed as "unexamined and unsupported." *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400, *cert. denied*, 498 U.S. 1012 (1990).

Hagen, 510 U.S. at 414 (emphasis added).

First, the Court prefaces the entire paragraph by expressly referencing "our precedent." *Id.* Second, in context, the complete paragraph makes clear that the Court was not fashioning or allowing any result that would accommodate such a novel argument even if it had been advanced and, of course, it was not. This *Hagen* "terminate a reservation" description of the overall issue in *Ute Indian Tribe*, squarely refutes any argument to the contrary. *See also DeCoteau*, 420 U.S. 425 ("terminated"). Lastly, this is the only permissible construction in light of the specific trust land versus historic boundary submissions detailed by all parties and *amici* throughout the *Ute Indian Tribe* and *Hagen* litigation.

E. Specific *Hagen* Submissions Clarify the Trust/Fee Jurisdictional Distinction and Undermine the Post-*Hagen* Argument.[8]

(i) Descriptions Employed by the Ute Tribe and the United States in *Hagen*.

Immediately after *Perank/Hagen* was decided by the Utah Supreme Court, the Ute Tribe and the United States

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[8] The Counties have limited the discussion here to post-Utah Supreme Court submissions to avoid repetition. Prior to that time and throughout the entire *Ute Indian Tribe* litigation, the Ute Tribe and the United States (and everyone else) repeatedly told all the courts, including this Court, the same thing—the issue was whether the reservation was "disestablished" except for the "trust" lands.

repeatedly told the United States District Court of Utah exactly what was at issue: the disestablishment of the original reservation boundaries, leaving only "trust" land as Indian country. Those express "disestablished" and "trust land" representations were submitted in conjunction with the motions for injunctive relief. It is true that after *Hagen* was decided in this Court, they changed their argument, but what they said before *Hagen* is telling. On July 31, 1992, the Ute Tribe submitted:

> The State Supreme Court's decision, . . . holds that the Uintah Valley Reservation was *disestablished*, except for those lands which are held in *trust* by the United States for the benefit of the Tribe. . . . The State court's judgment reduces, by almost *three* million acres, the criminal jurisdictional boundaries of the United States and Tribe. . . . The State law would subject tribal members who commit offenses off *trust* land to state criminal prosecution.

Mem. in Supp. of Renewed Mot. for Injunctive Relief at 8, 9, 10, *Ute Indian Tribe v. Utah* (D. Utah July 31, 1992) (No. C-75-408-J) (footnote omitted) (emphasis added).[9]

Two months later, in September, 1992:

> If permitted to be entered as a final judgment, *State v. Perank* would reduce the boundaries of the Uintah and Ouray Reservation, and, thus, the jurisdictional territory of the Tribe, under State law, to approximately *1.1 million acres of trust land*. . . . [T]he State Supreme Court ruled that the Reservation was *disestablished*, except for those lands held in *trust* for an individual Indian or the Tribe.

Tribe's Br. in Supp. of Permanent Inj. at 3, 8, *Ute Indian Tribe v. Utah* (D.Utah Sept. 24, 1992) (No. C-75-408-J) (footnote omitted) (emphasis added).

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[9] The Ute Tribe assumed the legal conclusion in *Perank/Hagen*, if affirmed, would also undermine the continuing existence of the original Uncompahgre Reservation. This point and the fact that the United States has now conceded that the Uncompahgre Reservation no longer exists, is discussed *supra*.

And then, in December, 1992, the Ute Tribe reiterated the same points in no uncertain terms:

> [T]he trial court had concluded that Clint Perank was an Indian and that Myton, Utah (*as well as all non-trust lands*) were *outside* the boundaries of the Reservation. . . .

Tribe's Reply Br. in Supp. of Permanent Inj. at 9, *Ute Indian Tribe* (No. C-75-408-J) (emphasis added).

The views of the United States were submitted to the district court at approximately the same time. In November, 1992, the United States unequivocally addressed this issue in similar terms:

> On July 17, 1992, the Supreme Court of Utah held in *State v. Perank*, 191 Utah Adv. Rep. 5 (1992), and two companion cases that the *exterior boundaries* of the Uintah and Ouray Indian Reservation (hereinafter "Reservation") have been *disestablished*. The state court ruling directly conflicts . . .

United States' Mem. as *Amicus Curiae* in Supp. of Ute Indian Tribe's Mot. for Injunctive Relief at 2, *Ute Indian Tribe v. Utah* (D.Utah Nov. 23, 1992) (No. C-75-408-J) (emphasis added) (footnote omitted).[10]

Nor did the Ute Tribe or the United States confine their views confirming the scope of the issue decided by the Utah Supreme Court to submissions in federal district court. The Ute Tribe told this Court the same thing for other reasons when opposing certiorari in *Hagen* in November, 1992:

> [T]he issue of whether Congress intended to *disestablish* the Uintah Valley Reservation, Utah.

Br. of *Amicus Curiae* Ute Indian Tribe in Opp'n to Granting the Writ of *Certiorari* at i, *Hagen*, 510 U.S. 399 (emphasis added).

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[10] It should be noted that this "disestablished" except for "trust land" analysis of the Ute Tribe and the United States was submitted to the same federal district court that subsequently, without mentioning the arguments, agreed with the Ute Tribe and the United States that "disestablished" except for "trust land" was not the issue presented or decided in *Hagen*.

It was in this light that this Court, fully informed, granted the petition for certiorari, notwithstanding the opposition of the Ute Tribe.

The United States, consistent with all previous submissions, also viewed the issue in the same light. However, the United States agreed that certiorari should be granted in *Hagen* because plenary review was appropriate. The review, according to the United States, would resolve the conflict between the views expressed by the Utah Supreme Court and the *Ute Indian Tribe* decision. The United States posed the question in the following manner:

> In *Perank*, the Utah Supreme Court concluded that the May 1902 Act and the March 1905 Act diminished the Uintah Indian Reservation and that the town of Myton accordingly lies outside the boundaries of the Reservation.

Br. for the United States as Amicus Curiae, *at 5, Hagen*, 510 U.S. 399 (citing Respondent's Br. App. at 289-639, *State v. Perank*, 858 P.2d 927 (Utah 1992)).

On the merits, the Ute Tribe next filed a motion to intervene as a matter of right in this Court in May, 1993. Again, the Ute Tribe repeatedly recognized, emphasized, and stressed the scope of the issue presented:

> This case will determine for all time the exterior boundaries of the Uintah and Ouray Reservation (hereafter the "Reservation"), which is located in northeastern Utah. . . . [A]n issue that will finally determine the scope of its jurisdiction. . . . The ruling of the Tenth Circuit recognized that the Tribe's jurisdiction extends to some 4.4 million acres . . . the Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, *finding* that the Reservation consists only of those lands held in *trust* by the United States for the Tribe or individual Indians. The ruling of the Utah Supreme Court has the effect of reducing the size of the Reservation, and correspondingly the *area* over which the Tribe may exercise jurisdiction, by approximately *three* million acres. . . . Such a judg-

> ment would *reduce* the Reservation by almost *three million* acres and *deprive* the Tribe and the United States of all civil and criminal jurisdiction over the *non-trust lands* of the Uintah Valley portion of the Reservation. More importantly, because of the "checkerboard" nature of land ownership patterns, a judgment reducing the boundaries of the Reservation would result in a *tract-book* search to determine both civil and criminal jurisdiction. . . . [T]ribal members would, if the Reservation were to be adjudged diminished, be subjected to criminal prosecutions in state court for infractions occurring on *non-trust lands* of the Reservation. *See DeCoteau v. District County Court*, 420 U.S. 425 (1975). Third, tribal members residing on *non-trust lands* of the Reservation would no longer be able to avail themselves of tribal court jurisdiction. . . . [T]ribal members not residing, working and locating their property on *trust* lands of the Reservation would be burdened. . . . As a practical matter, a diminishment of the Reservation would have the effect of creating two distinct classes of tribal members within the historic boundaries of the Reservation, those who live on *trust* lands and those who do not. Those members who reside on *trust* lands will continue to be subject to tribal and federal law, may make use of tribal courts and may participate in tribal government: However, those tribal members who now reside on *non-trust* lands of the Reservation . . . become persons subject to the jurisdiction of the State of Utah. . . . [T]he boundaries of the Reservation would no longer be at issue. . . .

Mot. of Ute Indian Tribe to Intervene as a Matter of Right at 2, 4-5, 7-8, 8-9, 9 n.5, 10 n.7, *Hagen*, 510 U.S. 399 (footnote omitted) (emphasis added).

This Court denied the Motion to Intervene.

In June, 1993, the Ute Tribe then submitted its brief *amicus curiae* in this Court. For the third time, the Ute Tribe described to this Court the issues in the same manner.

> While a decision that the Reservation has been *disestablished* would subject *Indians* to the full panoply

> of *state* law for conduct on *non-trust lands*. . . . Therefore, any discussions between McLaughlin and the Utes were *irrelevant* except to the extent, if any, that they influenced Congress to abandon any intent it may have had to *disestablish* the Reservation.

Br. of *Amicus Curiae* Ute Indian Tribe at 10 n.11, 25 n.25, *Hagen*, 510 U.S. 399 (emphasis added).

The United States, as *amicus curiae*, also repeated the same arguments. At this point, the issue was still described in the same terms:

> QUESTION PRESENTED: Whether the provisions of the Act of May 27, 1902, ch. 888, 32 Stat. 245, and the Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, that relate to settlement of non-Indians on the Uintah Indian Reservation *altered the boundaries* of the Reservation. . . . This case involves the boundaries of the Uintah Indian Reservation. The location of the boundaries affects the scope of the law enforcement obligations and powers of the United States under the Indian Major Crimes Act, 18 U.S.C. 1153, and other federal statutes that apply only in Indian country. . . . [T]he Utah Supreme Court *erred* in relying (Resp. App. 37a) on Inspector McLaughlin's advice to the Indians that "there will be *no outside boundary line* to this reservation."

Br. for the United States as *Amicus Curiae* Supp'g Pet'r at i, 1, 23 n.31, *Hagen*, 510 U.S. 399 (No. 92-6281) (emphasis added).

Although the Ute Tribe did not participate in Oral Argument before this Court, the United States did. Nothing in the Transcript of Oral Argument supports the post-*Hagen* position of the United States:

> QUESTION: . . . speaking of restoration to the public domain, if land had been restored, would the *reservation boundary be excluded*. . . . MR. MANN: . . . the language would not have been sufficient to *alter the boundaries* of the reservation.

Tr. of Oral Argument at 18, *Hagen*, 510 U.S. 399 (emphasis added).

(ii) Language employed by the Petitioner in *Hagen*.

The preceding discussion of the views of the Ute Tribe and the United States fairly reflects the issue as submitted and decided in the Utah Supreme Court and in this Court. In all respects, the views of the parties and other *amici* also mirror this understanding. There is no need in this petition to further document that position, however, with one exception. That exception involves the arguments of Petitioner in *Hagen*. Petitioner's views are noteworthy in this regard because they were submitted by former attorneys of record for the Ute Tribe involved in the federal district court, the court of appeals, and this Court in opposing certiorari in the original *Ute Indian Tribe* litigation. *Ute Indian Tribe*, 773 F.2d 1087 (10th Cir. 1985) *cert. denied*, 479 U.S. 994 (1986). As such, these arguments reflect a familiarity with all aspects of the disestablishment issue in *Ute Indian Tribe* and *Hagen*. This is the perspective from which Petitioners' submissions on the merits in *Hagen* should be viewed:

> [*Hagen*] had lived for five to six years on the Ute Reservation on *nontrust land* in the vicinity of Myton, Utah.
>
> [T]he issue of Uintah Valley Reservation *disestablishment*. . . . The *status* of the Uintah Valley Reservation was the focus of attention, not the periphery of concern in the federal court litigation. . . . If the Court upholds the State of Utah Supreme Court decision of July 17, 1992, then the State of Utah and its subdivisions will exercise general civil and criminal jurisdiction over Indians whenever they are located off *trust* lands. . . . The plan selected by Congress to ultimately open the Uintah Valley Reservation lacked the two critical *characteristics* found by the Court to have accomplished a reservation *extinguishment*. . . . The Utah Supreme Court improperly analyzes a portion of the 1903 *McLaughlin* report as evidence of an intent to surrender the Reservation boundary. . . . [I]t is entirely unfair (and inaccurate after *Solem*) for Utah to contend that restoring Indian

> lands to the public domain in and of itself *extinguishes a reservation boundary*. . . .

Br. of Pet'r. at 4, 5, 16-17, 29, 37, 43 n.24, 48, *Hagen*, 510 U.S. 399 (emphasis added).

In the Reply Brief, the views of Petitioner reflect the same position:

> Before the Court today, Utah seeks a ruling that, in fact, the *boundaries* of the Uintah Valley Reservation were *disestablished*. . . . federal courts preserving the boundary of the Uintah Valley Reservation. . . . This appeal will determine whether the State of Utah criminal justice system (as opposed to federal and tribal courts) will prosecute Indians committing crimes on . . . presently owned in *fee* by non-Indians. Regardless of the outcome of this case, federal and Tribal courts will continue to prosecute Indians on . . . lands retained by the Ute Indian Tribe for its members.

Reply Br. of Pet'r. at 2, 16-17, *Hagen*, 510 U.S. 399 (emphasis added).

At oral argument, the same counsel for Petitioner on the merits briefs *supra* (that represented the Ute Tribe in the district court, the court of appeals, and before this Court in opposing certiorari in the *Ute Indian Tribe* litigation), presented the issue in even more succinct terms:

> MR. SENECA: [T]he question presented is whether or not the *boundary* of the Uintah Reservation was *disestablished*. . . . MR. SENECA: . . . Now, it's couched in terms of whether or not the reservation was *disestablished*, and the reason it's couched in those terms is that if the reservation *boundary* had been *disestablished*, then Myton, Utah, is not in Indian country. . . . MR. SENECA: [T]his Court is going to have to decide whether or not that reservation *boundary* has been *disestablished* or not.

Tr. of Oral Argument at 3, 5, 9, *Hagen*, 510 U.S. 399 (emphasis added).

CONCLUSION

Petitioners are not unmindful of the considerations governing review on certiorari. Nor are we unmindful of the work that went into the decisions of this Court in such cases as *DeCoteau, Rosebud* and *Hagen*. In this case, we respectfully submit that there is truly a direct conflict between the decision of the court of appeals and the decision of this Court in *Hagen*, which is apparent from the rationale of the court of appeals. If that conflict is not resolved in some fashion by some type of appropriate relief in this Court, much of the effort in *Hagen* and the other cases will have been expended for nothing. For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Alternatively, consideration of this petition should be deferred until after this Court has had an opportunity to view the issue in light of the briefing and oral argument in *South Dakota v. Yankton Sioux Tribe* (No. 96-1581).

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 96-4073

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,
Plaintiff-Appellee,

v.

STATE OF UTAH; Duchesne County, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; DUCHESNE CITY, a municipal corporation, UINTAH COUNTY, a political subdivision of the State of Utah,
Defendants-Appellants,

and

UNITED STATES OF AMERICA,
Amicus Curiae.

May 8, 1997

Before TACHA, GODBOLD,* and HOLLOWAY, Circuit Judges.

TACHA, Circuit Judge.

This appeal requires us to address once again the status of the Uintah Valley Indian Reservation. In the district court, the Ute Indian Tribe ("Tribe") sought to obtain a

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* The Honorable John C. Godbold, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

permanent injunction preventing the State of Utah, the counties of Duchesne and Uintah, and the cities of Roosevelt and Duchesne ("state and local defendants") from exercising civil and criminal jurisdiction on certain lands within the original exterior boundary of the Uintah Valley Reservation in a manner inconsistent with our en banc opinion in *Ute Indian Tribe v. Utah,* 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied,* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). In opposing the injunction, the state and local defendants rely on *Hagen v. Utah,* 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), in which the Supreme Court held, contrary to our decision in *Ute Indian Tribe,* that the lands in question are not part of the Uintah Valley Reservation. Notwithstanding *Hagen,* the district court held that it was bound under the "law of the case" doctrine to follow our mandate in *Ute Indian Tribe* and thus, that it was without authority to alter the existing jurisdictional boundaries as set forth in *Ute Indian Tribe.* In light of the inconsistency between *Ute Indian Tribe* and *Hagen,* however, the district court requested that we issue instructions on how to proceed and suggested that we construe the request as an invitation to recall our mandate in *Ute Indian Tribe.*

The state and local defendants appeal, arguing that (1) our en banc decision in *Ute Indian Tribe* does not preclude their exercise of jurisdiction over former reservation lands under the doctrines of law of the case, collateral estoppel, or res judicata and (2) *Hagen* effectively overruled *Ute Indian Tribe,* permitting the defendants to exercise jurisdiction over all the lands originally held to be within reservation boundaries. Along with their appeal, the state and local defendants have filed a motion to recall, in its entirety, our mandate issued pursuant to *Ute Indian Tribe.* The United States as *amicus curiae* urges us to recall and modify the madate in *Ute Indian Tribe* only to the extent that it directly conflicts with *Hagen.* We exercise jurisdiction pursuant to 28 U.S.C. § 1291. Because we conclude that the boundaries of the Uintah Valley Reservation must be redetermined in light

of *Hagen*, we modify our holding in *Ute Indian Tribe* to the extent that it directly conflicts with the holding in *Hagen*.

BACKGROUND

I. INTRODUCTION

This case is unlike other reservation diminishment cases in which courts must decide whether congressional enactments opening reservation lands to non-Indian settlement have diminished or disestablished reservation boundaries. *See, e.g., Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *United States v. Celestine*, 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195 (1909). Over a decade ago, we answered that question when we addressed whether congressional enactments from 1902 through 1905 had the effect of diminishing the Uintah Valley Reservation. *Ute Indian Tribe*, 773 F.2d at 1093. Sitting en banc in 1985, we held that the Reservation had not been diminished. *Id.* The Supreme Court denied *certiorari* on December 1, 1986. *Utah v. Ute Indian Tribe*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986).

The State of Utah sought to relitigate the boundary issue in three criminal actions commenced in the Utah state courts. In these cases, the Utah Supreme Court concluded that the 1902-1905 allotment legislation had diminished the Uintah Valley Reservation. *State v. Hagen*, 858 P.2d 925 (Utah 1992); *State v. Coando*, 858 P.2d 926 (Utah 1992); *State v. Perank*, 858 P.2d 927 (Utah 1992).

In 1994, the Supreme Court granted *certiorari* "to resolve the direct conflict between these decisions of the

Tenth Circuit and the Utah Supreme Court on the question whether the Uintah Reservation has been diminished." *Hagen*, 510 U.S. at 409, 114 S.Ct. at 964. The Supreme Court expressly disagreed with our decision in *Ute Indian Tribe* and held that the Unitah Valley Reservation had been diminished. *Id.* at 421-22, 114 S.Ct. at 970-71. In this appeal, we decide whether to modify our judgment in *Ute Indian Tribe*, after the time for rehearing has passed, in light of its conflict with a later, contrary decision of the Supreme Court.

II. *Ute Indian Tribe I-III:* THE DISTRICT COURT, PANEL, AND EN BANC OPINIONS

In 1975, the Tribe sought to exercise jurisdiction over all of the land originally encompassed in the Uintah Valley Reservation pursuant to the Tribe's newly enacted Law and Order Code. When non-Indians living in and around several towns within the original boundaries protested the action, the Tribe sought declaratory and injunctive relief in federal court to establish the exterior boundaries of the Uintah Valley Reservation and to restrain the state and local defendants from interfering with enforcement of the Law and Order Code within those boundaries. The Tribe argued that the original boundaries of the Uintah Valley Reservation, established by executive order in 1861 and confirmed by Congress in 1864, continued to exist undiminished. The Tribe thus argued that it had jurisdiction over all of the lands encompassed within the original boundaries of the Reservation because such lands were "Indian country" as defined by 18 U.S.C. § 1151.

On the other hand, the state and local defendants argued that congressional enactments from 1902 through 1905, opening Reservation lands to non-Indian settlement and setting aside lands for a national forest reserve, had the effect of diminishing the Uintah Valley Reservation. The defendants also argued that congressional enactments from 1894 to 1897 had the effect of completely disestablishing the Tribe's Uncompahgre Reservation.

In addressing the parties arguments, the district court gave a comprehensive summary of the relevant legislation, legislative history, contemporaneous interpretations by the executive branch, and other circumstances surrounding the enactment of the legislation. We therefore only briefly summarize the legislative treatment of the lands below.

A. Legislative Treatment of Reservation Lands

1. The Uintah Valley Reservation

In 1902, Congress passed legislation directing the Secretary of the Interior to make individual allotments out of the Uintah Valley Reservation by October 1, 1903, provided that a majority of the adult male members of the Ute Indians consented. Act of May 27, 1902, ch. 888, 32 Stat. 263, 263-64 ("1902 Act"). The 1902 Act stated that after October 1, 1903, "all the unallotted lands within said reservation *shall be restored to the public domain*" and subject to entry by non-Indians under the homestead laws. *Id.* (emphasis added). Congress delayed the allotment process, however, and extended the opening date in 1903 and again in 1904. Act of Mar. 3, 1903, ch. 994, 32 Stat. 982, 997-98; Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-08. In 1905, Congress extended the opening date a third time—to September 1, 1905—and directed the Secretary to allot the Reservation unilaterally if the Tribe's consent was not obtained. Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70 ("1905 Act"). The 1905 Act did not contain the same language restoring the unallotted and unreserved lands to the "public domain," but provided that such lands *"shall be disposed of under* the general provisions of the homestead and townsite laws of the United States." *Id.* (emphasis added).

2. The National Forest Lands

In addition to extending the time of entry under the 1902 Act and describing the entry process, the 1905 Act authorized the President to "set apart and reserve" lands

in the Reservation as a forest reserve prior to opening. 33 Stat. 1070. Pursuant to this power, on July 14, 1905, President Theodore Roosevelt issued a proclamation designating some 1,010,000 acres within the Uintah Valley Reservation as an addition to the Uintah National Forest Reserve. Proclamation of July 14, 1905, 34 Stat. 3113, 3116. The proclamation also declared that the unallotted lands in the Uintah Valley Reservation, which were not otherwise reserved, would "be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws." *Id.* at 3120.

3. The Uncompahgre Reservation

In 1894, Congress passed legislation providing for the allotment of the Uncompahgre Reservation to individual members of the Tribe. The legislation stated that all unallotted lands "*shall . . . be restored to the public domain* and made subject to entry" under the homestaed and mineral laws. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 337-38 (emphasis added). The allotment process, however, was delayed, and in 1897, Congress passed legislation mandating the allotment of the Uncompahgre Reservation and opening the unallotted lands to entry. Act of June 7, 1897, ch. 3, 30 Stat. 62, 87.

B. *Ute Indian Tribe I:* 1981 District Court Opinion

In 1981, the district court issued *Ute Indian Tribe v. Utah,* 521 F.Supp. 1072 (D.Utah 1981) (hereinafter "*Ute Indian Tribe I*"). The district court held that Congress's decision to open the unallotted lands to settlement did not diminish the Reservation's boundaries. *Id.* at 1132. The court recognized that the language of the 1902 Act directing that all unallotted lands "be restored to the public domain" would have diminished the Reservation had the unallotted lands then been opened for settlement. *Id.* at 1122. The court concluded, however, that the 1905 Act superseded the 1902 Act. *Id.* Unlike the 1902 Act,

the 1905 Act provided only that the unallotted lands were to "be disposed of under" the homestead and township laws. *Id.* at 1132. The district court reasoned that the new language indicated that Congress did not intend to diminish the Reservation. *Id.* The district court therefore concluded that the unallotted lands remained part of the Uintah Valley Reservation. *Id.*

The district court reached a different conclusion on the status of the National Forest Lands and the Uncompahgre Reservation. Regarding the National Forest Lands, the court concluded that the language in the 1905 Act empowering the president to "set apart and reserve" timber lands for a national forest demonstrated Congress's clear intent to diminish the Uintah Valley Reservation. *Id.* at 1136. Likewise, the district court concluded that the language in the 1894 Act restoring unallotted reservation lands "to the public domain" showed a clear congressional intent to disestablish the Uncompahgre Reservation. *Id.* at 1106.

C. *Ute Indian Tribe II:* The 1983 Court of Appeals Panel Decision

In a two-judge majority opinion, a panel of this court affirmed the district court opinion in part and reversed in part. *Ute Indian Tribe v. Utah,* 716 F.2d 1298 (10 Cir. 1983) (hereinafter "*Ute Indian Tribe II*"). The panel held that none of the lands in question remained within the original reservation boundaries.

The panel agreed with the district court that the 1902 Act's language restoring the unallotted lands "to the public domain" was sufficient to diminish the Uintah Valley Reservation. *Id.* at 1308-09. Unlike the district court, however, the panel concluded that the 1905 Act did not supersede Congress's intent to diminish the Reservation under the 1902 Act. *Id.* at 1311. Thus, the panel held that the

1902-1905 allotment legislation had diminished the Uintah Valley Reservation. *Id.* at 1311-12.

The panel agreed with the district court's conclusions regarding the National Forest Lands and the Uncompahgre Reservation. The panel concluded that Congress intended to withdraw the National Forest Lands, *id.* at 1314, and the Uncompahgre Reservation, *id.* at 1307, from their original reservation status.

D. *Ute Indian Tribe III:* The 1985 Court of Appeals En Banc Decision

On rehearing en banc, a majority of the court held that all of the lands at issue retained their reservation status. *Ute Indian Tribe v. Utah,* 773 F.2d 1087, 1093 (10th Cir.1985) (en banc) (hereinafter "*Ute Indian Tribe III*"). The en banc court concluded that the 1902-1905 allotment legislation did not have the effect of diminishing or disestablishing the Uintah Valley Reservation. *Id.* at 1089. Similarly, the court held that the withdrawal of the National Forest Lands did not diminish the Uintah Valley Reservation, *id.* at 1090, and that the 1894 and 1897 allotment legislation did not disestablish the Uncompahgre Reservation. *Id.* at 1093.

In reaching a holding completely contrary to the panel, the en banc court relied on the newly-decided case of *Solem v. Bartlett,* 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). The court concluded that under *Solem,* congressional language restoring reservation lands to the public domain "is not the same as a congressional state of mind to diminish," and hence "does not reliably establish the clear and unequivocal evidence of Congress' intent to change the boundaries." *Ute Indian Tribe III,* 773 F.2d at 1092. Further, the court found no legislative history or other contemporary historical evidence sufficient to support a finding of diminishment or disestablishment as to any of

the lands in question. *Id.* at 1092-93. Thus, the court held that all the lands retained their reservation status and remained Indian country, subject to the jurisdiction of the Tribe and the federal government. Thereafter, the Supreme Court denied *certiorari*. *Utah v. Ute Indian Tribe,* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986).

III. *Utah v. Hagen*: The 1994 Supreme Court Decision

In several related criminal cases arising in the late 1980s, the Utah Supreme Court ruled, contrary to the Tenth Circuit, that the original boundaries of the Uintah Valley Reservation had been diminished by the 1902-1905 allotment legislation. *See State v. Perank,* 858 P.2d 927 (Utah 1992); *State v. Coando,* 858 P.2d 926 (Utah 1992); *State v. Hagen,* 858 P.2d 925 (Utah 1992). The cases arose as a result of state felony prosecutions against three Indians for crimes committed in Myton and Roosevelt, Utah, two towns within the original boundaries of the Uintah Valley Reservation. The defendants challenged the prosecutions on the basis that the state trial court lacked jurisdiction over their crimes because the defendants committed their crimes in "Indian country" as defined by 18 U.S.C. § 1151(a). The defendants argued that under our en banc decision in *Ute Indian Tribe II,* the towns remained within the Reservation and thus within Indian country. The State of Utah, on the other hand, argued that our holding in *Ute Indian Tribe III* was wrong, that the Reservation had been diminished, and that the towns were outside the Reservation and thus outside Indian country. The Utah Supreme Court agreed with the State, and held that because the Reservation had been diminished, the state trial court properly exercised criminal jurisdiction over the defendants. *Perank,* 858 P.2d at 953; *Coando,* 858 P.2d at 927; *Hagen,* 858 P.2d 925-26.

In 1993, the Supreme Court granted *certiorari* in *Hagen* to resolve the conflict between the decisions of the Tenth

Circuit and the Utah Supreme Court. *Hagen v. Utah*, 507 U.S. 1028, 113 S.Ct. 1840, 123 L.Ed.2d 466 (1993). In 1994, the Supreme Court affirmed the Utah Supreme Court's resolution of the boundary issue, expressly rejecting *Ute Indian Tribe III*'s conclusion that the Uintah Valley Reservation had not been diminished. *Hagen v. Utah*, 510 U.S. 399, 421-22, 114 S.Ct. 958, 970-71, 127 L.Ed. 2d 252 (1994).

In *Hagen*, the Supreme Court performed a familiar analysis of the statutory language, legislative history, and contemporary historical understanding of the allotment legislation at issue. *See id.* at 410-21, 114 S.Ct. at 964-71. The Court's analysis, however, was limited to the status of the unallotted Uintah Valley Reservation lands opened to settlement under the 1902-1905 allotment legislation. *See id.* The Court did not address the National Forest Lands or the Uncompahgre Reservation, neither of which was before the Court for consideration. After looking to the three diminishment factors, the Court concluded that Congress's "baseline intent to diminish the Reservation expressed in the 1902 Act survived the passage of the 1905 Act," *id.* at 415, 114 S.Ct. at 967, and that the "[c]ontemporary historical evidence supports [the] conclusion that Congress intended to diminish the Uintah Reservation." *Id.* at 416, 114 S.Ct. at 968. The Court therefore upheld the State of Utah's exercise of criminal jurisdiction over acts occurring within the original boundaries of the Uintah Valley Reservation. *Id.* at 421-22, 114 S.Ct. at 970-71.

IV. *Ute Indian Tribe IV:* The 1996 District Court Decision

Immediately after the Utah Supreme Court issued its slip opinions in the state criminal cases, the Tribe filed a motion in federal district court seeking a permanent injunction preventing the state and local defendants from enforcing or relying upon *Perank*, *Coando* and *Hagen* in any way. On August 31, 1992, the state and local defendants

and the Tribe entered into a stipulation, under which the state and local defendants agreed to refrain from enforcing the Utah Supreme Court decision in *Perank* or exercising jurisdiction in any manner inconsistent with the en banc decision in *Ute Indian Tribe III*, pending a decision on the merits in the district court. The district court incoroprated the stipulation into an order dated September 2, 1992 ("Injunction Order").

In 1993, after the Supreme Court granted *certiorari* in *Hagen*, the district court stayed further proceedings on the Tribe's motion pending the outcome *of Hagen* in the Supreme Court. On February 23, 1994, the Supreme Court issued its decision in *Hagen*. On April 24, 1994, the state and local defendants filed a motion to vacate and set aside the Injunction Order and to dismiss the Tribe's motion for permanent injunctive relief.

On May 2, 1994, the district court modified the Injunction Order "to allow the [s]tate and [l]ocal [d]efendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Valley Reservation which are not 'Indian country' as defined by 18 U.S.C. § 1151, *et seq.*" The court emphasized that it was "not determining one way or another which lands may or may not constitute 'Indian country' " [1]

On April 2, 1996, the district court issued *Ute Indian Tribe v. Utah*, 935 F.Supp. 1473 (D.Utah 1996) ("*Ute Indian Tribe IV*"). In a comprehensive and detailed opinion, the district court fully addressed the binding effect, as between the parties, of our earlier en banc decision in *Ute Indian Tribe III*, as well as the extent of direct con-

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[1] The district court modified its order to allow the State of Utah to prosecute felonies on former reservation lands because in *United States v. Duncan*, 857 F.Supp. 852 (D.Utah 1994), the district court had dismissed a federal felony prosecution against an Indian for acts occurring in Roosevelt, Utah. The court ruled that *Hagen* precluded federal jurisdiction on such lands. *Id.* at 853.

flict between *Ute Indian Tribe III* and *Hagen*. *Id.* at 1484-1516. Rather than finally deciding these issues, however, the district court held that it was bound under "law of the case" rules to enforce the mandate in *Ute Indian Tribe III*. *Id.* at 1516-25. Thus, the district court did not reach the merits of the Tribe's request for permanent injunctive relief. *Id.* In lieu of a final resolution of the dispute, the district court requested that we issue instructions on how to proceed and suggested that we construe the request as an invitation to recall our mandate in *Ute Indian Tribe III*. The court also concluded that the Injunction Order, as modified, should remain in effect to allow the state and local defendants to prosecute criminal felonies occurring on former Uintah Valley Reservation lands. *Id.* at 1531. This appeal followed.

DISCUSSION

I. INTRODUCTION

On appeal, the Tribe maintains that principles of finality require the district court to enjoin permanently the state and local defendants from exercising jurisdiction in a manner inconsistent with *Ute Indian Tribe III*. On the other hand, the state and local defendants argue that we should give effect to the contrary boundary determinaton in *Hagen* by recalling the mandate in *Ute Indian Tribe III* in its entirety and reinstating the original Tenth Circuit panel opinion. The United States as *amicus curiae* urges us to recall and modify the mandate in *Ute Indian Tribe III* only to the extent that it directly conflicts with *Hagen*.

In resolving this dispute, we follow a three-part framework. First, we decide whether the district court was bound to follow the mandate in *Ute Indian Tribe III* by continuing the Injunction Order. After concluding that the district court properly followed our mandate, we nevertheless decide whether to modify *Ute Indian Tribe III* in light of the inconsistent boundary determination in *Hagen*. Finally, after concluding that *Ute Indian Tribe III* should

be modified, we decide whether to recall our mandate in its entirety or modify our en banc opinion only to the extent that it directly conflicts with *Hagen*. Because of the importance of finality, we conclude that *Ute Indian Tribe III* should be modified only to the extent that it conflicts with *Hagen*.

II. The Binding Effect of Ute Indian Tribe III

We begin by determining the binding effect of *Ute Indian Tribe III* on the allocation of jurisdiction among the federal government, the Tribe, and the state and local defendants. Whether the district court was bound by the mandate in *Ute Indian Tribe III* to continue the Injunction Order, and whether this court is bound by principles of finality to enforce our prior boundary determination, are separate inquiries. We address each question in turn.

A. The Mandate Rule

The state and local defendants first contend that the district court erred in holding that it was bound by *Ute Indian Tribe III* to continue to enjoin their exercise of civil and non-felony jurisdiction despite the Supreme Court's decision in *Hagen*. We review the district court's decision to continue an injunction for an abuse of discretion, examining "whether the district court committed an error of law or relied on clearly erroneous fact findings." *Walmer v. United States Dep't of Defense*, 52 F.3d 851, 854 (10th Cir.), *cert. denied* —— U.S. ——, 116 S.Ct. 474, 133 L.Ed.2d 403 (1995). We review questions of law decided by the district court de novo. *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1555 (10th Cir.), *cert. denied*, —— U.S. ——, 117 S.Ct. 297, 136 L.Ed.2d 216 (1996).

The district court concluded that it was bound by the "law of the case" doctrine to enforce the boundary determinations in *Ute Indian Tribe III*. Under that doc-

trine, once a court decides an issue, the same issue may be relitigated in subsequent proceedings in the same case. *Arizona v. California,* 460 U.S. 605, 618-19, 103 S.Ct. 1382, 1391-92, 75 L.Ed.2d 318 (1983); *United States v. Monsisvais,* 946 F.2d 114, 115-16 (10th Cir. 1991). An important corollary of the doctrine, known as the "mandate rule," provides that a district court "must comply strictly with the mandate rendered by the reviewing court." *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America,* 962 F.2d 1528, 1534 (10th Cir. 1992); *see also Mason v. Texaco, Inc.,* 948 F.2d 1546, 1553 (10th Cir. 1991) ("Under the 'law of the case' doctrine, the district court may not deviate from the appellate court's mandate."). In this case, the district court concluded that the mandate in *Ute Indian Tribe III* remained in effect and therefore ruled that it was bound to follow the mandate by continuing to enjoin the defendants' exercise of jurisdiction.

The state and local defendants contend that the district court is not bound by the mandate in *Ute Indian Tribe III* because of an intervening change in controlling law, an exception to the mandate rule. *See Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531, 1536 n. 4 (10th Cir.1995). The defendants maintain that because *Hagen* was "intervening" (*i.e.,* coming after *Ute Indian Tribe III* but before the Tribe's present motion for injunctive relief), the district court should have departed from the appellate mandate and followed the boundary determination in *Hagen.* The defendants contend that the district court, by failing to do so, wrongfully continued to enjoin their exercise of jurisdiction pursuant to *Hagen.*

The argument of the state and local defendants is without merit. In short, the intervening-change-in-law exception does not apply where, as here, the case in which the erroneous ruling occurred is no longer sub judice—that is, where the case has become final. *See Colorado Interstate Gas,* 962 F.2d at 1534 (holding that once an appellate

court resolves an issue and remands the case to enter judgment in accordance with the mandate, the district court may not disregard the mandate and apply a later change in law on remand because the question is no longer sub judice); *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir.1958) (holding that "[a] change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies" setting aside a final judgment).

In *Ute Indian Tribe III*, our en banc opinion disposed of all boundary questions at issue on the merits. Our ruling left nothing for the district court to address beyond the "ministerial dictates of the mandate." *Colorado Interstate Gas Co.*, 962 F.2d at 1534. In other words, the case was no longer sub judice after December 9, 1986. As of that date, the district court was without authority to depart from an appellate mandate based on a later change in law. Because *Ute Indian Tribe III* proceeded to a final decision, a later change in law could not "reopen the door already closed." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541, 111 S.Ct. 2439, 2446, 115 L.Ed.2d 481 (1991). Accordingly, we hold that the district court properly followed our mandate in *Ute Indian Tribe III* by continuing to enjoin the state and local defendants from exercising jurisdiction pursuant to *Hagen*.

B. Modification of *Ute Indian Tribe III*

Although the district court did not err in holding that it was bound by *Ute Indian Tribe III*, we nevertheless must decide whether to modify our judgment in *Ute Indian Tribe III* in light of the Supreme Court's inconsistent boundary determination in *Hagen*. The question whether to modify our earlier judgment raises competing concerns involving the finality of a court's judgment and the need for uniformity in decisionmaking throughout the federal court system. In deciding this question, we first discuss whether an appellate court has the power to modify a

mandate and the circumstances in which exercise of that power is appropriate. With these circumstances in mind, we next determine whether we are precluded by the principles of collateral estoppel or res judicata from departing from the boundary determination of *Ute Indian Tribe III*. Finally, after concluding that we are not bound by the traditional principles of finality, we directly confront the relative importance of finality and uniformity in the context of this case.

1. The Power of an Appellate Court to Modify a Mandate

The defendants' motion to recall the mandate in *Ute Indian Tribe III* requires us first to ask whether an appellate court possesses the authority to recall or modify a mandate after the time for rehearing has passed. In this circuit, as in all circuits that have addressed the issue, "an appellate court has power to set aside at any time a mandate that was procured by fraud or act to prevent an injustice, or to preserve the integrity of the judicial process." *Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir.1987); *see also American Iron & Steel Inst. v. EPA*, 560 F.2d 589, 593 n. 15 (3d Cir.1977) (listing cases); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 275-80 (D.C.Cir. 1971) (discussing particular ground for recalling a mandate). Although the rule is stated in broad terms, the appellate courts have emphasized that the power to recall or modify a mandate is limited and should be exercised only in extraordinary circumstances. *See American Iron & Steel Inst.*, 560 F.2d at 594 (emphasizing that recall of a mandate is an extraordinary remedy, one to be used sparingly").[2] The limited nature of this power

[2] Indeed, we have found only one case in which we have departed from a prior mandate after a final decision because of a later change in law. In *Pierce v. Cooke & Co.*, 518 F.2d 720, 723 (10th Cir.1975), we permitted relitigation of already settled claims where plaintiffs with claims under state law were forced to litigate in federal court because of diversity and received "substantially differ-

is a reflection of the importance of finality: once parties are afforded a full and fair opportunity to litigate, the controversy must come to an end and courts must be able to clear their dockets of decided cases. As the Third Circuit explained, "[P]arties should be afforded ample opportunity to litigate their claims, but once a final disposition is reached they should not expect that the good offices of the court will be available for a chance to press their claims anew." *Id.* at 592. Mindful of the important limitations on an apellate court's power to disrupt a settled judgment, we next address whether we are precluded from modifying the mandate in *Ute Indian Tribe III* under the principles of collateral estoppel or res judicata.

2. Collateral Estoppel and Res Judicata

In seeking permanent injunctive relief against the state and local defendants, the Tribe contends that collateral estoppel and res judicata preclude the state and local defendants from relying on *Hagen*. In particular, the Tribe argues that the Court should enjoin the defendants' enforcement of *Hagen* under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283,[8] which permits a federal court to enjoin proceedings in state court where the party asserting a claim or issue in the state court is barred from doing so by res judicata or collateral estoppel. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150-51, 108 S.Ct. 1684, 1691-92, 100 L.Ed.2d 127 (1988) ("The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the fed-

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ent treatment than that [later] received in state court by another injured in the same accident." *Id.* at 723. *Pierce* was an "extraordinary case" based on an "unusual combination of events" and is not applicable to the case before us today. *Id.*

[8] Section 2283 provides: "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

eral court. It is founded in the well-recognized concepts of res judicata and collateral estoppel."). The Tribe argues that because *Ute Indian Tribe III* produced a final judgment on the merits (thereby resolving the boundary issue in favor of the Tribe), the doctrine of collateral estoppel binds this court and precludes the defendants from enforcing the contrary holding in *Hagen*. The Tribe maintains that the Supreme Court's decision in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), prohibits any departure from the settled boundary determination of *Ute Indian Tribe III*, even where that decision is erroneous in light of a late change in law.

We disagree that *Federated Department Stores* controls the outcome of this case. In *Federated Department Stores*, 452 U.S. at 398, 101 S.Ct. at 2427-28, the Supreme Court rejected an attempt by the Ninth Circuit to craft an exception to the doctrine of res judicata based on a later change in controlling law. The case involved seven retail purchasers who brought separate actions against the owners of various department stores, alleging that the stores had engaged in illegal price fixing. *Id.* at 395-96, 101 S.Ct. at 2426-27. After the district court dismissed the actions on the grounds that the plaintiffs had failed to state a claim for relief under the applicable statute, five of the plaintiffs appealed the ruling and, ultimately, obtained a reversal by the Supreme Court. *Id.* at 396, 101 S.Ct. at 2426-27. Instead of appealing the district court's ruling as the other five plaintiffs had done, two plaintiffs refiled their actions in state court, which were removed to federal court. *Id.* The federal district court held that because the two plaintiffs sought to relitigate the same claim against the same defendants, the actions had to be dismissed under the doctrine of res judicata. *Id.* at 396-97, 101 S.Ct. at 2426-27.

The two plaintiffs appealed to the Ninth Circuit. *Id.* at 397, 101 S.Ct. at 2427. While their appeal was pending, the Supreme Court announced that the other plain-

tiffs had stated a claim for relief. *Id.* The Ninth Circuit concluded that the two plaintiffs should be allowed to benefit from the Supreme Court's decision because their position was closely interwoven with the other five cases. *Id.* The court stated that because all of the dismissals rested on precedent that the Supreme Court had since overruled, the doctrine of res judicata must give way to the competing concerns of "public policy" and "simple justice." *Id.* at 398, 101 S.Ct. at 2427.

In reversing, the Supreme Court expressly rejected the Ninth Circuit's "novel exception to the doctrine of res judicata." *Id.* The Court explained:

> [W]e do not see the grave injustice which would be done by the application of accepted principles of res judicata. . . . The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities of a particular case. There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata. . . . This Court has long recognized that [p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.

Id. at 401, 101 S.Ct. at 2429 (citations and internal quotation marks omitted).

Contrary to the Tribe's argument, our case is distinguishable from *Federated Department Stores* in two important respects. First, in contrast to *Federated Department Stores,* where the issue was whether a change in law would permit the incipient relitigation of an issue resolved in a prior suit, the State of Utah in this case has already relitigated the boundary issue. We are not now deciding whether a party—in this case the State—deserves a second bite at the apple. The boundary relitigation is over.

The Utah Supreme Court has issued a final ruling, which the United States Supreme Court has affirmed, resulting in a clearly inconsistent judgment. For this reason, the Tribe's reliance on collateral estoppel is misplaced.

Second, in deciding whether to modify *Ute Indian Tribe III*, we are not motivated by a desire to achieve a more accurate judgment or to avoid the injustice that might result from a strict application of the principles of finality, as was the case in *Federated Department Stores*. The fact that *Ute Indian Tribe III* may have been wrongly decided or operates unfairly against the state and local defendants is not a concern that informs our analysis. *See* 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4426, at 265 (1981) ("If relitigation were permitted whenever it might result in a more accurate determination, in the name of 'justice,' the very values served by preclusion would be quickly destroyed."). Rather, our decision is based on the need to reconcile two inconsistent boundary determinations and to provide a uniform allocation of jurisdiction among separated sovereigns. For this reason, *Federated Department Store*'s relevance to this case is limited. The question here is not whether the State of Utah should be able to relitigate the boundary issue (which it has already done), but which decision—*Ute Indian Tribe III* or *Hagen*—should control the allocation of jurisdiction among the state and local defendants, the Tribe, and the federal government. The State's successful relitigation of the boundary issue has put the judgment in *Ute Indian Tribe III* on a collision course with *Hagen*, and therefore, we must directly confront whether *Ute Indian Tribe III* should give way to the equally final, contrary judgment in *Hagen*. To that inquiry, we now turn.

3. Finality and Uniformity

As discussed above, the question whether to modify our judgment in *Ute Indian Tribe III* raises the compet-

ing concerns of finality and uniformity. Thus, in deciding this question, we must assess the relative importance of finality and uniformity in the context of this case.

Although we are not bound by collateral estoppel to enforce the boundary determination of *Ute Indian Tribe III*, departure from the settled judgment implicates the important purposes of finality. Over a century ago, the Supreme Court discussed the importance of finality:

> This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order, for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them.

Southern Pac. Ry. Co. v. United States, 168 U.S. 1, 49, 18 S.Ct. 18, 27-28, 42 L.Ed. 355 (1897); *see also Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 467 n. 6, 102 S.Ct. 1883, 1890 n. 6, 72 L.Ed.2d 262 (1982). The Court also has addressed the particular purposes of finality:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. United States, 440 U.S. 147, 153-54, 99 S.Ct. 970, 973-74, 59 L.Ed.2d 210 (1979). Accordingly, before departing from a settled decision, we must consider whether such departure might "substantially frustrate [collateral estoppel's] purpose of protecting litigants from burdensome relitigation and of promoting judicial econ-

omy." *United States v. Stauffer Chem. Co.* 464 U.S. 165, 172, 104 S.Ct. 575, 579, 78 L.Ed.2d 388 (1984).

The Tribe contends that departure from *Ute Indian Tribe III* would frustrate the important purposes of finality and would upset its reasonable expectations in the continuing validity of a settled judgment. The litigation that led to *Ute Indian Tribe III* lasted ten years and resulted in a costly victory for the Tribe. It also consumed important judicial resources. Perhaps most important from the Tribe's point of view, the decision in *Ute Indian Tribe III* purported to define conclusively the respective jurisdictional boundaries of the various governmental authorities operating in and around the Uintah Valley Reservation. Indeed, the Tribe continues to rely on *Ute Indian Tribe III* in exercising civil and non-felony jurisdiction on lands within the original reservation boundaries. "When a court has determined disestablishment of a given reservation in its particular historical and factual setting, prevention of inconsistent adjudication becomes desirable insofar as it fosters reliance on judicial decision making." *White Earth Band of Chippewa Indians v. Alexander,* 683 F.2d 1129, 1135 (8th Cir. 1982). The Tribe argues that this reasoning, as well as the other important purposes of finality, support enforcement of the settled judgment of *Ute Indian Tribe III.*

The same important purposes of finality, however, apply equally to the final judgment in *Hagen.* Once *Hagen* became final, the State of Utah was entitled to rely on the collateral estoppel effect of that judgment just as the Tribe was entitled to rely on its judgment in *Ute Indian Tribe III.* Had the Tribe brought its present request for injunctive relief prior to the conclusion of the state litigation in *Hagen,* the principle of finality clearly would have favored the Tribe and might, even have required an injunction against the state proceedings. *See Parsons Steel, Inc. v. First Ala. Bank,* 474 U.S. 518, 524, 106 S.Ct. 768, 772, 88 L.Ed.2d 877 (1986) (holding that the re-

litigation exception to the Anti-Injunction Act does not permit a federal court to enjoin a state court proceeding "once the state court has finally rejected a claim of res judicata"). In this situation, however, where the State has already relitigated the boundary issue, the economy and judicial resource concerns that normally operate to preclude a second lawsuit are of little relevance. Although the Tribe may have a more forceful reliance interest given the length of time *Ute Indian Tribe III* has remained in effect, enjoining the state and local defendants in this suitation would do little to further the core purposes of finality. As discussed above, the second litigation has proceeded to a final judgment and has already resulted in an inconsistent decision.

Moreover, we note that "res judicata and collateral estoppel . . . promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry,* 449 U.S. 90, 95-96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980). Thus, enjoining the State's enforcement of *Hagen* in this situation would "violate basic tenets of comity and federalism." *Kremer,* 456 U.S. at 478, 102 S.Ct. at 1896. By reaching the merits in *Hagen,* the Utah Supreme Court effectively ruled that the State was not precluded from relitigating the boundary issue. In the absence of a successful challenge to this ruling in the Supreme Court, we must give full effect to the state court judgment and may not impose "the highly intrusive remedy of a federal-court injunction against the enforcement of the state court judgment." *Parsons Steel, Inc.,* 474 U.S. at 525, 106 S.Ct. at 772.[4]

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[4] In *State v. Hagen,* 802 P.2d 745, 747 (Utah,Ct.App.1990), the Utah Court of Appeals expressly relied on the collateral estoppel effect of *Ute Indian Tribe III* in holding that the state court lacked jurisdiction over the Indian defendants. Nevertheless, the Utah Supreme Court reversed, citing its earlier conclusion in the companion case of *State v. Perank,* 858 P.2d 927 (Utah 1992), but without further discussion of collateral estoppel. *Hagen,* 858 P.2d at 925-26. When *Hagen* reached the Supreme Court, the Court declined

In the situation before us, where the purposes of finality do not clearly support enforcement of either judgment, we might on the sole basis of our hierarchical system of courts prefer to give effect to the pronouncement of the Supreme Court. In an analogous context, for example, the D.C. Circuit stated that "[w]here, as here, a decision of the Supreme Court—the preeminent tribunal in our judicial system—departs in some pivotal aspects from those of lower federal courts, amendatory action may be in order to bring the pronouncements of the latter courts into line with the views of the former." *American Iron & Steel Inst.*, 560 F.2d at 596. We do not, however, take such "amendatory action" in this case merely on the basis of the incongruency between our decision in *Ute Indian Tribe III* and *Hagen*. Additional factors, including the importance of uniformity, also support our view that *Ute Indian Tribe III* should be modified in light of *Hagen*.

Uniformity is an important value in our system of judicial decisionmaking. While "[c]onflicts in the circuits are generally accepted and in some ways even welcomed," *Stauffer Chem. Co.*, 464 U.S. at 177, 104 S.Ct. at 582 (White, J., concurring), uniform decisionmaking within each circuit is essential. The related doctrines of collateral estoppel and stare decisis are exactly the sort of tools that have been designed to ensure uniformity and compliance with binding precedent. Like collateral estoppel, stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on

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to address whether collateral estoppel barred relitigation of the boundary issue. *Hagen*, 510 U.S. at 409-10, 114 S.Ct. at 964-65. The Court relied on the procedural ground that counsel for the petitioner had failed to raise collateral estoppel in seeking a writ of *certiorari*. *Id.* The Court found "no reason to consider an argument that petitioner not only failed to raise but on which he expressly refused to rely in seeking a writ of *certiorari*." *Id.* at 410, 114 S.Ct. at 965. Accordingly, the Utah Supreme Court's ruling that collateral estoppel did not prevent relitigation of the boundary issue remains the settled judgment of that court.

judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed. 2d 720 (1991). Unfortunately, these doctrines have so far failed to prevent the inconsistency between *Ute Indian Tribe III* and *Hagen*. Given the important values that underlie these doctrines, we cannot allow such an inconsistency to persist.

More importantly, the lack of uniformity between *Ute Indian Tribe III* and *Hagen* presents a practical dilemma of daily importance. Although the Tribe continues to exercise civil and non-felony criminal jurisdiction on those portions of the Uintah Valley Reservation that were opened to settlement under the 1902-1905 allotment legislation, the State of Utah is solely responsible under *Hagen* for bringing felony prosecutions on the same lands. Often the difference between state and tribal jurisdiction is a matter of only a few dollars, the amount separating a misdemeanor from a felony in the case of theft, for example. Similar problems arise in determining whether an assault constitutes a misdemeanor subject to tribal and federal jurisdiction or whether it constitutes a felony subject to state jurisdiction. In this situaton, the interest of uniformity clearly supports modification of *Ute Indian Tribe III* and creation of a uniform allocation of jurisdiction. As the Third Circuit stated, " '[U]niformity' in application of principles and in decision-making might constitute a 'special reason for disturbing [the] repose and finality . . .' of an earlier adjudication." *American Iron & Steel Ins.*, 560 F.2d at 597 (quoting *Greater Boston Television Corp.*, 463 F.2d at 278-79).

Although a uniform allocation of jurisdiction would eliminate the existing confusion, we are mindful that "[f]inality must . . . delimit equality in a temporal sense, and we must accept as a fact that the argument for uniformity loses force over time." *James B. Beam Distilling*

Co., 501 U.S. at 542, 111 S.Ct. at 2447. As a limit on uniformity, finality is of particular importance where a change in law threatens to disrupt a final tort award or other settled judgment based on then-existing legal principles. The need for finality, however, applies with less force to judgments that are not "inherently final" but are rather of "a continuing nature." *American Iron & Steel Inst.*, 560 F.2d at 599. Where a prior erroneous judgment necessarily affects continuing conduct, the interests of uniformity may demand departure from the prior judgment to bring a court's view of the law into line with the prevailing view. *See Federal Labor Relations Auth. v. United States Dep't of Treasury*, 884 F.2d 1446, 1456 D.C. Cir. 1989) (concerning federal agencies' duty to disclose federal employees' names and addresses to labor unions); *American Iron and Steel*, 560 F.2d at 597-99 (concerning application of water pollution regulations); *Moch v. East Baton Rouge Parish School*, 548 F.2d 594 (5th Cir. 1997) (concerning apportionment of parish school board); *Christian v. Jemison*, 303 F.2d 52, 54-55 (1962) (concerning prohibition of racial segregation after abandonment of "separate but equal" doctrine); 18 CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER. § 4415, at 131 (stating that "ordinary . . . preclusion rules are often strained by continuing conduct"). The character of *Ute Indian Tribe III* reflects this type of judgment. As the district court noted, the state and local defendants are not seeking "to unravel the intricate tapestry of individual judgments already made final each time a new decision is announced." *Ute Indian Tribe IV*, 935 F.Supp. at 1510. Instead, the defendants are seeking to apply *Hagen* prospectively to the continuing conduct of separate sovereigns and the individuals living in and around the Uintah Valley Reservation. This case does not involve the retroactive application of *Hagen* to events or lawsuits that have occurred in the past. To the extent that *Hagen* threatens to displace a judgment "on which reliance may reasonably have been

placed," *James B. Beam Distilling Co.*, 501 U.S. at 538, 111 S.Ct. at 2445, today's decision is limited to prospective application only. *See United States v. Cuch*, 79 F.3d 987, 995 (10th Cir.) (rejecting the retroactive application of *Hagen* to vacate a federal criminal conviction on collateral attack), *cert. denied*, —— U.S. ——, 117 S.Ct. 384, 136 L.Ed.2d 301 (1996).

The Tribe raises one final argument against modification of *Ute Indian Tribe III*. The Tribe contends that even if *Ute Indian Tribe III* does not continue to define the current boundaries of the Uintah Valley Reservation as between the State of Utah and criminal defendants under *Hagen*, the decision still should apply to legal relations between the state and local defendants and the Tribe. In effect, the Tribe urges us to adopt a dual jurisdictional system. Under such a system, *Ute Indian Tribe III* would control the allocation of authority among the named parties to this lawsuit in their dealings with each other, while *Hagen* would apply to the state and local defendants' relationships with all other parties. The Tribe contends that such a dual system is warranted because the state and local defendants, as full participants in *Ute Indian Tribe III*, are directly bound by our en banc decision, while the Tribe, as a nonparty to the litigaton in *Hagen*, is not directly bound by the Supreme Court's decision. Accordingly, the Tribe contends that the state and local defendants may properly assert jurisdiction over non-Indians within those portions of the original Uintah Valley Reservation that were open to settlement under the 1902-1905 legislation (the *Hagen*-based jurisdictional overlay). In their dealings with the Tribe and its members, however, the state and local defendants must recognize the authority of the Tribe and the federal government within those same portions of the Reservation (the *Ute Indian Tribe III*-based overlay).

We reject the Tribe's contention that jurisdiction must be allocated among the parties by two inconsistent bound-

ary determinations. The task of allocating jurisdiction necessarily involves line-drawing, and in an area where there is a compelling need for uniformity, there must be a single bright line. A dual system would only continue the confusion that has characterized the relationship between the parties since the issuance of *Hagen*. Under the Tribe's approach, for example, jurisdiction would depend not on the geographic locale of the crime or event at issue, but on the relationship between the State of Utah and the individual or entity over whom the State seeks to exercise jurisdiction. Rather than creating a stable allocation of jurisdiction where the parties' respective jurisdictions can be determined by reference to lines on a map, the Tribe's approach would introduce enormous uncertainty into an already complicated system. Each time the state and local defendants attempt to assert jurisdiction over a new party, whether to collect a tax or enforce a regulation, they would risk having to establish jurisdiction over that party through time-consuming and costly litigation. In addition, we question the propriety of allocating jurisdiction based on the application of procedural rules (*i.e.*, collateral estoppel and stare decisis) that were themselves designed to eliminate inconsistency and unpredictability. Further, the legal basis for the Tribe's dual jurisdictional scheme is undermined by our conclusion that the state and local defendants are not directly bound by *Ute Indian Tribe III*, at least as that decision conflicts with the contrary holding in *Hagen*.

For the reasons articulated above, we conclude that modification of our earlier judgment is appropriate, not merely because the two decisions are incongruent, but because of the effect of the incongruency on the interests of uniformity and the integrity of our system of judicial decisionmaking. We therefore hold that the judgment in *Ute Indian Tribe III* should be modified in light of the extraordinary circumstances presented in this case. To dispel any doubts, we emphasize the rarity that should attend the use of this remedy. "Because this Court or-

dinarily will view motions to recall a mandate with disfavor, the opinion in this matter should not be read as an invitation to litigants to seek review of already adjudicated claims." *American Iron & Steel Inst.*, 560 F.2d at 599.

We do not, however, recall *Ute Indian Tribe III* in its entirety. To the extent that *Ute Indian Tribe III* decided matters not addressed in *Hagen*, finality requires those decisions to remain undisturbed. Thus, we modify our earlier judgment only to the extent that it directly conflicts with the holding in *Hagen*. We next address the extent to which the two cases are in direct conflict.

III. Jurisdictional Boundaries After *Hagen*

In determining the parties' respective jurisdictional boundaries after *Hagen*, we begin by identifying the areas where *Ute Indian Tribe III* and *Hagen* are not in conflict and can be reconciled. To the extent that the boundary determinations made in the *Ute Indian Tribe III* do not directly conflict with *Hagen*, they remain in effect.

In *Ute Indian Tribe IV*, the 1996 district court opinion, the court fully addressed the areas of genuine conflict between *Ute Indian Tribe III* and *Hagen*. In large part, we need look no further than the district court's detailed opinion to determine those portions of the original Uintah Valley Reservation that remain the exclusive province of the Tribe and the federal government. *See Ute Indian Tribe IV*, 935 F. Supp. at 1485-1505. In sum, we agree with the district court that *Hagen* did not effectively overrule the entire judgment in *Ute Indian Tribe III*, including our holdings concerning the National Forest Lands and the Uncompahgre Reservation. Further, we agree that *Hagen's* only effect was to reduce (and not termintate) the boundaries of the Uintah Valley Reservation to the extent that lands within the Reservation were unallotted, opened for settlement under the 1902-1905 legislation, and not thereafter returned to

tribal ownership. Accordingly, we hold that our prior judgment in *Ute Indian Tribe III* should be, and is now, modified to the extent that lands within the original reservation boundaries were unallotted, opened to non-Indian settlement under the 1902-1905 legislation, and not thereafter returned to tribal ownership.[5]

A. The Uintah Valley Reservation, The Uncompahgre Reservation, and the National Forest Lands

In *Ute Indian Tribe III*, we decided three reservation diminishment issues. First, we concluded that the 1902-1905 allotment legislation did not have the effect of diminishing or disestablishing the Uintah Valley Reservation. *Ute Indian Tribe III*, 773 F.2d at 1089. Second, we concluded that the withdrawal of the National Forest Lands did not diminish the Uintah Valley Reservation. *Id.* at 1090. Finally, we held that the 1894 and 1897 allotment legislation did not diminish or disestablish the Uncompahgre Reservation. *Id.* at 1093.

Hagen dealt only with the first of these three issues. As the district court stated:

> *Hagen* determined "that the Uintah Indian Reservation has been diminished by Congress," *i.e.*, that the original boundary of the Uintah Valley Reservation does not currently define the present territorial extent of federal, state and tribal jurisdiction in the Uintah Basin.

Ute Indian Tribe IV, 935 F.Supp. at 1484 (citing *Hagen*, 510 U.S. at 419-21, 114 S.Ct. at 969-70). The district court continued:

> *Hagen* [did not] address the Tenth Circuit's determination in [*Ute Indian Tribe III*] that the 1905 na-

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[5] Because we depart from a mandate of the en banc court and modify the earlier judgment in this case, we have circulated this opinion to the en banc court pursuant to our rules. Each member of the en banc court has concurred in our holding.

> tional forest withdrawals of approximately 1,010,000 acres of reservation land did not diminish the Uintah Reservation boundaries. *Hagen* also makes no ruling concerning the boundaries of the Uncompahgre Reservation, the original extent of which was reaffirmed by the Tenth Circuit.

Id. at 1485.

Although the state and local defendants admit that *Hagen* did not address the status of the Uncompahgre Reservation or the National Forest Lands, they assert that we should nevertheless recall our entire mandate in *Ute Indian Tribe III*. The defendants argue that *Hagen* effectively overruled the fundamental premise upon which the entire holding of *Ute Indian Tribe III* was based--namely, that statutory restoration language is insufficient to infer diminishment. They point out that in *Hagen* the Supreme Court stated that "restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status." 510 U.S. at 414, 114 S.Ct. at 967. The state and local defendants argue that in light of this statement, *Ute Indian Tribe III*'s holding concerning the National Forest Lands and the Uncompahgre Reservation cannot stand because the entire holding was based on a misreading of the same congressional restoration language that was at issue in *Hagen*.

Assuming that *Ute Indian Tribe III*'s holding with respect to the National Forest Lands and the Uncompahgre Reservation was based on a misreading of the applicable legislation, such a misreading alone is not sufficient to justify departing from our earlier judgment. As we stated earlier, our decision to modify *Ute Indian Tribe III* does not result from the desire to correct a prior erroneous judgment, but rather from the need to reconcile our decision with a directly conflicting decision of the Supreme Court. Because *Hagen* did not directly address our holding in *Ute Indian Tribe III* as it relates to the National

Forest Lands and the Uncompahgre Reservation, we have no reason to depart from that part of our prior judgment. We thus reject the defendants' contention that the judgment in *Ute Indian Tribe III* should be recalled in its entirety.

B. Non-Trust Lands Within the Original Boundaries of the Uintah Valley Reservation

Because we have concluded that *Hagen* did not address the status of the National Forest Lands or the Uncompahgre Reservation, we must now address the extent to which *Hagen* directly conflicts with *Ute Indian Tribe III*. In particular, we must decide which lands within the Uintah Valley Reservation are no longer Indian country after *Hagen*. The remaining controversy centers on whether the state and local defendants or the Tribe and the federal government have jurisdiction over the various categories of non-trust (*i.e., fee*), lands within the original boundaries of the Uintah Valley Reservation, whether held by Indians or non-Indians.

Under 18 U.S.C. § 1151, the Tribe and the federal government have civil and criminal jurisdictions over "Indian country." *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540-41 (10th Cir. 1995). Indian country includes "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151(c). This category constitutes lands held in trust by the federal government. Indian country also encompasses "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). Thus, Indian Country also includes all non-trust, or fee, lands so long as such lands are located within the "limits of any Indian reservation."

There are four categories of non-trust lands at issue in this case:

(a) lands that passed from trust to fee status pursuant to non-Indian settlement under the 1902-1905 allotment legislation;

(b) lands apportioned to the "Mixed Blood" Utes under the Ute Partition Act, Act of Aug. 27, 1954, Pub.L. No. 97-698, ch. 1009, 68 Stat. 868 (codified at 25 U.S.C. §§ 677-677aa);

(c) lands allotted to individual Indians that have passed into fee status after 1905; and

(d) lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status by the Tribe for then-fee (now trust) lands in an effort to consolidate its land holdings pursuant to the Indian Reorganization Act, Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-79) and the Indian Land Consolidation Act of 1983, Pub.L. No. 97-459, 96 Stat. 2517 (codified at 25 U.S.C. §§ 2201-11).

See Ute Indian Tribe IV, 935 F.Supp. at 1484, 1486. In *Ute Indian Tribe III*, we held that the 1902-1905 allotment legislation did not have the effect of diminishing or disestablishing the Uintah Valley Reservation. We thus concluded that all of the non-trust lands identified above remained "Indian country" under § 1151(a) as lands within "the limits of any Indian reservation." In this case, we must determine the extent to which *Hagen* directly conflicts with our earlier conclusion that all of the above categories of non-trust lands remain within Indian country.

The parties do not dispute that *Hagen* directly conflicts with the first category of non-trust lands, those lands passing in fee to non-Indians pursuant to the 1902-1905 allotment legislation. This was precisely the category of fee lands at issue in *Hagen*. Accordingly, we modify our mandate in *Ute Indian Tribe III* and hold in accordance with *Hagen* that these lands are no longer within Indian

country under section 1151(a) subject to the jurisdiction of the Tribe and the federal government.

With respect to the other three categories of non-trust lands, the state and local defendants argue that these lands also are no longer within Indian country after *Hagen*. They contend that the Supreme Court in *Hagen* "clearly contemplated that the exterior boundaries of the Reservation would simply be gone." Appt. Brief, at 44. In other words, the defendants argue that the Court held that the 1902-1905 legislation completely terminated the Reservation such that no discrete, definable reservation boundaries now exist. Under the defendants' theory, there are no external boundaries and thus no "limits of any reservation." Indian country therefore is confined under § 1151(c) to "Indian allotments . . . which have not been extinguished," or trust lands. Under the theory that Indian country is limited to trust lands, the defendants argue that the three disputed categories of non-trust lands no longer constitute Indian country.

We reject the defendants' argument that *Hagen* removed all non-trust lands within the original Uintah Valley Reservation from Indian country. In *Hagen*, the Supreme Court did not decide that the 1902-1905 allotment legislation completely disestablished the Uintah Valley Reservation, erasing its outer boundaries and rendering § 1151(a) inapplicable to the three disputed categories of non-trust lands. The Court in *Hagen* stated:

> [W]e hold that the restoration of *unallotted reservation lands* to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act *diminished* the reservation.

Hagen, 510 U.S. at 414, 114 S.Ct. at 967 (emphasis added). The Court stated that the Uintah Valley Reserva-

tion had been "diminished"—not "disestablished," "eliminated," or "terminated." Moreover, the diminishment was only "with respect to those lands" that had been restored to the public domain under the 1902-1905 legislation. *See Ute Indian Tribe IV*, 935 F.Supp. at 1487-88. We therefore conclude that *Hagen* did not erase the boundaries of the Uintah Valley Reservation and that the current "limits of [the] reservation" thus embrace the three categories of non-trust lands at issue. In sum, *Hagen* does not conflict with our holding in *Ute Indian Tribe III* that these categories of non-trust lands remain within Indian country under section 1151(a).

We note that this conclusion has the benefit of producing a stable, unchanging allocation of jurisdiction. Under our approach, the Tribe and the federal government retain jurisdiction over all trust lands, the National Forest Lands, the Uncompahgre Reservation, and the three categories of non-trust lands that remain within the boundaries of the Uintah Valley Reservation. The state and local defendants have jurisdiction over the fee lands removed from the Reservation under the 1902-1905 allotment legislation. Although a title search may be necessary to determine which lands were opened under the 1902-1905 legislation, the parties' respective jurisdictions will never change once the status of those lands is conclusively determined. By contrast, under the defendants' theory (*i.e.*, that Indian country is limited to trust lands) the Indian country status of land would change as trust lands are transferred into fee lands. We recognize that while our approach might result in a checkerboard allocation of jurisdiction, such a result is more desirable than the defendants' approach, which would produce a "moving checkerboard" because lands leaving trust status would also lose their status as Indian country.

In conclusion, we reject the argument that Indian country is confined to lands held in trust by the federal government under § 1151(e). Rather, Indian country extends to all trust lands, the National Forest Lands, the

Uncompahgre Reservation, and the three disputed categories of non-trust lands discussed above.[6]

CONCLUSION

For the foregoing reasons, we DENY the defendants' motion to recall our mandate in *Ute Indian Tribe III*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). Rather, we MODIFY our mandate in *Ute Indian Tribe III* as set out above and REMAND with instruction that the district court consider the Tribe's request for permanent injunctive relief in light of this opinion.

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[6] We decline to address whether any portion of the non-trust lands opened in 1905 might still constitute Indian country under section 1151(b) as a "dependent Indian community" because that question is not properly before the court. The district court may be asked to consider the question upon remand.

APPENDIX B

UNITED STATES DISTRICT COURT
D. UTAH
CENTRAL DIVISION

No. 75-C-408J

UTE INDIAN TRIBE,
Plaintiff,

v.

STATE OF UTAH,
Defendant-in-Intervention.

and

DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,
Defendants.

April 2, 1996

MEMORANDUM OPINION AND ORDER

JENKINS, Senior District Judge.

On September 12, 1994, the above-captioned matter came on before this Court for a hearing on the merits. Robert S. Thompson, III, Esq., appeared on behalf of the plaintiff, the Ute Indian Tribe. John W. Andrews, Esq., and Michael M. Quealy, Esq., appeared on behalf of the

State of Utah. Herbert Wm. Gillespie, Esq.; Duchesne County Attorney, and Joann B. Stringham, Esq., Uintah County Attorney, accompanied by Tom Tobin, Esq., appeared on behalf of defendants Duchesne and Uintah Counties. Roland Uresk, Esq., appeared on behalf of defendant Duchesne City. Clark Allred, Esq., appeared on behalf of defendant Roosevelt City. Lauren N. Soll, Esq., United States Department of Justice, and Joseph Anderson, Esq., Assistant United States Attorney, appeared on behalf of the United States of America as *amicus curiae*, accompanied by William McConkie, Esq., United States Department of the Interior.

The pending motions revisit a subject explored in depth in this same litigation some time ago: the territorial extent of the Ute Indian Tribe's jurisdiction, at least as it may be delimited by the legal boundaries of the Uintah and Ouray Indian Reservation. That question was resolved among these parties by *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986), resulting in a judgment that the Ute Indian Tribe now seeks to enforce in this court through entry of a permanent injunction. The State of Utah, defendants Duchesne and Uintah Counties, Duchesne City and defendant Roosevelt City (collectively, the "State and Local Defendants"), resist this, urging this court instead to disregard the Tenth Circuit's *en banc* ruling on appeal in this litigation in favor of redetermining the Ute reservation boundaries in light of the United States Supreme Court's more recent decision in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). These defendants have also moved to dissolve the Order, entered by this court pursuant to stipulation of the parties on September 2, 1992, (nunc pro tunc to August 3, 1992), which was designed to preserve (more or less) the jurisdictional status quo pending the deter-

mination of the Ute Indian Tribe's Renewed Motion for Injunctive Relief.[1]

Background and Procedural History

As the Ute Indian Tribe explains in its brief, the promulgation in 1975 of the Ute Law and Order Code "raised immediate protests from the State of Utah and from the political subdivisions located within the original boundaries" of the Ute Reservation. Brief of Plaintiff Ute Indian Tribe in Opposition to Defendants' Motion to Dissolve Preliminary Injunction, filed July 15, 1994, at 2-3. "In the hope of establishing, once and for all, the exterior boundaries of the Reservation, and the geographic scope of the Tribe's jurisdiction, the Tribe filed [this] action for declaratory relief in this Court in 1975," joining Duchesne City and Roosevelt City as defendants. *Id.* at 3. The State of Utah intervened as a defendant and Uintah County was joined as a defendant by stiplation of the parties in the Pretrial Order. After conducting a trial on the merits and examining the pertinent legislation and historical materials in some detail, this court made an initial ruling defining the boundaries of the Uintah Valley Reservation and holding that the Uncompahgre Reservation had been disestablished. *See Ute Indian Tribe v. State of Utah,* 521 F.Supp. 1072 (D.Utah 1981). That determination was affirmed in part and reversed in part by a three-judge panel of the Tenth Circuit (716 F.2d 1298 (10th Cir. 1983)); the

[1] The September 2, 1992 Order was once modified "to allow the State and Local Defendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Valley Reservation which are not 'Indian Country' as defined by 18 U.S.C. 1151, *et seq.*" Order, dated May 2, 1994, at 1-2. "In making this modification," however, this court was "not determining one way or another which lands may or may not constitute 'Indian Country,'" and the Order was entered "without prejudice to any claims of the parties as to the effect of the decision of the United States Supreme Court in *Hagen v. Utah*, or as to which lands may or may not constitute 'Indian Country.'" *Id.* at 2.

panel's decision in turn was affirmed in part and reversed in part on rehearing *en banc* (773 F.2d 1087 (10th Cir. 1985)). The United States Supreme Court denied certiorari (479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986)), and the Tenth Circuit issued its mandate pursuant to the *en banc* ruling, which was docketed by the Clerk of this court on December 9, 1986. Notice of receipt of the mandate was mailed to all counsel of record.

In its *en banc* ruling, the Tenth Circuit held that the Uintah Valley Reservation, created by Executive Order in 1861[2] and confirmed by Act of Congress in 1864,[3] had not been diminished by congressional legislation enacted from 1902 through 1905 opening unallotted and unreserved lands on the Reservation to entry under the homestead and townsite laws,[4] or by the inclusion of portions of the Reservation among lands withdrawn as national forest lands by Act of Congress and Presidential Proclamation in 1905.[5] 773 F.2d at 1088-1090; *see also id.* at 1099-1100 (Seymour, Holloway, McKay & Logan, JJ., concurring). The Tenth Circuit likewise held that the Uncompahgre Reservation had not been diminished by allotment legislation enacted in 1894 and 1897, which restored its unallotted lands "to the public domain" and opened them " 'for location and entry under all the land laws of the United States; . . .' " 773 F.2d at 1090-93 (quoting

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[2] Executive Order 38-1 (reprinted in 1 Charles Kappler, *Indian Affairs: Laws and Treaties* 900 (1904)).

[3] Act of May 5, 1864, ch. 77, 13 Stat. 63.

[4] *See* Act of May 27, 1902, ch. 888, 32 Stat. 263; J.Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902); Act of March 3, 1903, ch. 994, 32 Stat. 998; Act of April 21, 1904, ch. 1402, 33 Stat. 207; Act of March 3, 1905, ch. 1479, 33 Stat. 1069. (The complete text of this legislation is reprinted in Appendix A to this court's initial memorandum opinion. *See* 521 F.Supp. at 1167-1174.)

[5] *See* Act of March 3, 1905, ch. 1479, 33 Stat. 1069; Proclamation of July 14, 1905, 34 Stat. 3116 (reprinted in 3 Charles Kappler *Indian Affairs: Laws and Treaties* 602-605 (1913)).

the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87); *see also id.* at 1093-1099 (Seymour, Holloway, McKay & Logan, JJ., concurring).

The Tenth Circuit's *en banc* ruling closely followed the Supreme Court's decision in *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), decided 18 months earlier. Writing for a unanimous Court in *Solem*, Justice Thurgood Marshall concluded that the 1908 Act,[6] which authorized and directed the Secretary of the Interior "to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations . . . lying and being within the following described boundaries, . . ." when "read as a whole, does not present an explicit expression of congressional intent to diminish the Cheyenne River Sioux Reservation." 465 U.S. at 476, 104 S.Ct. at 1169. Further, *Solem* held that "[n]either the Act of May 29, 1908, the circumstances surrounding its passage nor subsequent events clearly established that the Act diminished the Cheyenne River Sioux Reservation." 465 U.S. at 481, 104 S.Ct. at 1171. References in some sections of the 1908 Act to "the respective reservations thus diminished," [7] or to timber harvesting on the opened lands "only as long as the lands remain part of the public domain," [8] and even a few references in legislative materials to a "reduced reservation" or to lands reserved for the use of the Indians on both reservations as diminished," did not add up to a clear expression of congressional intent to diminsh either reservation. *Id.* at 474-78, 104 S.Ct. at 1168-70. Importantly, the contemporary and subsequent legislative history of the opening of the Cheyenne River Reservation reflected ambiguities similar to those appearing in the record in *Ute Indian Tribe:* "examples pointing in both directions leave one with the distinct impression that subsequent Congresses had no clear view whether the

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[6] Act of May 29, 1908, ch. 218, § 1, 35 Stat. 460, 460-61.

[7] *Id.* at § 2, 35 Stat. 461.

[8] *Id.* at § 9, 35 Stat. 464.

opened territories were or were not still part of the Cheyenne River Reservation." *Id.* at 479, 104 S.Ct. at 1170.

Relying explicitly on *Solem*, the Tenth Circuit in *Ute Indian Tribe* reasoned:

> The 1902 Act would have returned all surplus Uintah Reservation lands to the public domain if the Ute Tribe's consent could be obtained. That consent was never forthcoming. The Tribe refused all requests to give up their lands. As a result of the impasse, Congress passed additional legislation in 1902 and 1904 extending the time set for opening of the Reservation. . . . Finally, Congress passed the 1905 Act, opening the Reservation for non-Indian settlement under the homestead and townsite laws. This measure, which actually effected the opening of the Reservation, did not contain the public domain language used in the 1902 Act.
>
> It is not possible to find that the series of congressional enactments summarized above revealed a "baseline purpose of disestablishment," . . . that carried through into the 1905 Act. To do so is inconsistent with the Supreme Court's longstanding directive, reiterated in *Solem*, that in the absence of "substantial and compelling evidence of a congressional intention to diminish Indian lands," the courts' "traditional solicitude for the Indian tribes" must compel a finding that "the old reservation boundaries survived the opening." [465 U.S. at 472,] 104 S.Ct. at 1167. It is impossible to draw disestablishment conclusions or inferences from these congressional statements.
>
> An examination of the 1902-1905 series of congressional enactments with the proper "solicitude for the Indian tribes," *Solem*, [465 U.S. at 472,] 104 S.Ct. at 1167, provides inferences against diminishment. . . . The strongest inferences that is to be

> drawn from Congress' actions is that Congress wished surplus Uintah Reservation lands to be put to productive use. . . .

773 F.2d at 1089 (citations omitted). "Congress' use of 'homestead and township acts' language in the 1905 Act, as contrasted with its use of 'public domain language' in the 1902 Act," the Tenth Circuit concluded, "is evidence of a clear retreat from any desire to effect a wholesale diminishment of the Reservation." *Id.* (footnote omitted).

After requesting and receiving a brief from the Solicitor General of the United States concerning the issues presented (478 U.S. 1002, 106 S.Ct. 3291, 92 L.Ed.2d 707 (1986)), the United States Supreme Court denied certiorari on December 1, 1986. *Utah v. Ute Indian Tribe,* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986) (mem.).

The State of Utah, not content simply to abide by the Tenth Circuit's judgment in this action (in which it plainly had participated as a party), found opportunity to relitigate the boundary issue in three criminal actions commenced and prosecuted in its name in the Utah state courts. These cases, *State of Utah v. Perank,*[9] *State of Utah v. Coando,*[10] and *State of Utah v. Hagen,*[11] arose in

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[9] 858 P.2d 927 (Utah 1992). In defending a state probation revocation proceeding in 1986, Clinton Perank raised the question of jurisdiction based upon the *Ute Indian Tribe* decision. Although "[a]ppellate jurisdiction would ordinarily lie with the Utah Court of Appeals," the *Perank* opinion noted that "[b]ecause of the importance of the question presented, the Court of Appeals certified the case to this Court." *Perank,* 858 P.2d at 930 n. 1.

[10] 784 P.2d 1228, 1229 (Utah Ct.App.1989) ("The State argues that notwithstanding the *Ute Indian Tribe* decision, Roosevelt is not in Indian country. . . ."), *affirmed,* 858 P.2d 926 (Utah 1992). In *Coando,* the Utah Supreme Court granted certiorari review "to determine whether that court correctly upheld the state's exercise of jurisdiction"—notwithstanding the fact that the Utah Court of Appeals did not reach either the "Indian country" issue or the question whether Coando was an enrolled tribal member—and

the Uintah Basin communities of Myton and Roosevelt and involved neither the Ute Indian Tribe nor any of its enrolled tribal members. In one of the three cases, *State v. Perank,* the Utah Supreme Court invited both the Ute Indian Tribe and the United States to file *amicus curiae* briefs, which both did.[12] In none of these cases was the Ute Tribe joined as a party.

On July 17, 1992, the Utah Supreme Court issued opinions in *Perank, Coando* and *Hagen.* Justice Stewart's opinion for the majority in *Perank* announced that court's conclusion that the boundaries of the Uintah Valley Reservation had been diminished, such that the town of Myton was no longer within "Indian country," and elaborated at some length on the majority's reasoning in reaching that result. *See Perank,* 858 P.2d at 933-953.

Almost immediately, the Ute Indian Tribe filed a renewed motion before this court seeking preliminary injunctive relief against any assertion of jurisdiction by the defendants in reliance on the *Perank* decision. Though the motion was fully briefed by the parties and calendared for hearing on August 3, 1992, it was not ruled upon at that

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affirmed Coando's conviction in light of *State v. Perank,* decided the same day, which held that Myton, Utah is not "Indian country." Justice Durham noted that in doing so, "[w]e therefore affirm his conviction on grounds other than those upon which the court of appeals relied." 858 P.2d at 927.

[11] 802 P.2d 745, 747 (Utah Ct.App.1990) ("While we have not been acquainted with the precise arguments advanced by the state in *Perank,* we are hard-pressed to see how, given the Supremacy clause and the doctrine of collateral estoppel, our state courts could reach a contrary decision that would have any practical effect."), *reversed,* 858 P.2d 925 (Utah 1992).

[12] In the *Perank* opinion, the Utah Supreme Court noted that the Justice Department filed a copy of the brief originally filed in opposition to the petition for writ of certiorari in the *Ute Indian Tribe* case following the Tenth Circuit's 1985 *en banc* ruling. The brief filed by the Ute Tribe apparently addressed only the threshold question whether defendant Perank was an "Indian" for purposes of 18 U.S.C. § 1151. 858 P.2d at 930-31.

time. By stipulation signed by all of the parties to this action, it was agreed that the State and Local Defendants would "refrain from enforcing the Utah Supreme Court's decision in *State v. Perank*, [858 P.2d 927,] No. 8602433 [sic] (Utah July 17, 1992)," and would refrain from exercising criminal jurisdiction over Indians who are members of the Indian Tribe or any other federally recognized Indian Tribe," as well as "civil jurisdiction over actions involving the Ute Indian Tribe or members of the Ute Indian Tribe, or interfering, in any way, with the Tribe's exercise of such civil or criminal jurisdiction within the exterior boundaries of the Uintah and Ouray Reservation, Utah," as those boundaries were defined by the Tenth Circuit in *Ute Indian Tribe*. The parties also agreed that the Ute Indian Tribe "shall exercise criminal jurisdiction over Indians who are members of the Ute Indian Tribe or any other federally recognized Indian Tribe" and that the Tribe would "exercise civil and regulatory jurisdiction over Indians and non-Indians to the extent permitted by law within the exterior boundaries" as defined by *Ute Indian Tribe*. This court simply ordered that "the parties shall comply with the provisions of said stipulation," pending this court's ruling on the merits of the Tribe's renewed motion for injunctive relief. Order, dated September 2, 1992, (*nunc pro tunc* to August 3, 1992).

The hearing on the Tribe's renewed motion was reset for December 22, 1992, then rescheduled for April 14, 1993, in light of the filing of a petition for certiorari in the *Hagen* case, (*see* Order, dated December 17, 1992), and again reset to June 18, 1993, after the Solicitor General of the United States filed a brief regarding the certiorari petition. *See* Order, dated March 26, 1993. Upon the grant of certiorari by the Supreme Court in the *Hagen* case, this court stayed further proceedings in this action pending the outcome of that appeal. *See* Order, dated April 29, 1993.[18]

[18] The State of Utah also filed motions before the Utah Supreme Court to stay issuance of that court's remittitur in the *Perank*,

On February 23, 1994, the United States Supreme Court announced its decision in *Hagen*, holding that the Uintah Valley Reservation had been diminished by Congress when its unallotted and unreserved lands were "opened" to non-Indian settlers pursuant to the 1902 Act, and therefore, that Myton, Utah was not within "Indian country" within the meaning of 18 U.S.C. § 1151 (1988 ed.). *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994).

The announcement of the *Hagen* decision provoked a flurry of motion practice in this proceeding. The State and Local Defendants filed a motion to dissolve the September 2, 1992 Order of this court preserving the jurisdictional status quo, and then on April 27, 1994, a "Motion for Emergency Relief" concerning the exercise of criminal jurisdiction, which was calendared for hearing on May 2, 1994.[14] Following that hearing, this court entered an Order modifying the September 2, 1992 Order "to allow the State and Local Defendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Valley Reservation which are not "Indian country" as defined by 18 U.S.C. § 1151, *et seq.*" Order, dated May 2, 1994. At the May 2, 1994 hearing, this court scheduled a hearing on all pending motions for June 7, 1994, which was continued at the request of the parties until August 2,

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Coando and *Hagen* cases, which was granted "pending (1) the conclusion of any proceedings on certiorari in the United States Supreme Court . . . and (2) the final disposition of the injunction proceeding pending in the United States District Court for the District of Utah, *Ute Indian Tribe v. State of Utah, et al.*, [521 F.Supp. 1072,] Civil No. C75-408. Until this Court lifts the stay, the decision in *State v. Perank*, . . . shall not be relied on as precedent by any lower court." *Perank*, 858 P.2d at 930 (Utah 1993).

[14] This motion was filed shortly after the Supreme Court's denial of a petition for rehearing in *Hagen*. *See Hagen v. Utah*, —— U.S. ——, 114 S.Ct. 1580, 128 L.Ed.2d 222 (1994).

1994, with briefs to be filed during July.[15] On July 15, 1994, the Tribe filed its Brief of Plaintiff Ute Indian Tribe in Opposition to Defendants' Motion to Dissolve Preliminary Injunction ("Brief of Ute Indian Tribe");[16] on July 26, 1994, the defendants filed the State and Local Defendants' Memorandum for Injuctive Relief ("Defendants' Memorandum");[17] and on July 29, 1994, the Government filed the United States' Memorandum as *Amicus Curiae* in Response to the State of Utah's Motion to Vacate and Set Aside the Preliminary Injunction ("United States' Memorandum").[18]

At the request of counsel, the August 2, 1994 hearing was conducted as a status or pretrial conference, at which

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[15] Upon an informal request by counsel, the matter was again set down for a status conference on July 14, 1994, but no one appeared. *See* Minute Entry, dated July 14, 1994.

[16] Previously, the Tribe had filed its Brief in Support of Permanent Injuntcion, dated September 25, 1992, as well as the Tribe's Reply Brief in Support of Permanent Injunction, filed December 17, 1992, both of which predate *Hagen*. Counsel for the Tribe submitted additional materials by Letter, dated September 1, 1994, including the slip opinion in *Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 31 F.3d 964 (10th Cir.1994) and a memorandum opinion prepared by the Regional Solicitor, U.S. Department of the Interior, dated July 7, 1994, concerning the impact of *Hagen* on federal, state and tribal jurisdiction within the Uintah Basin.

[17] While the State and Local Defendants filed no memorandum accompanying their Motion to Vacate and Set Aside Preliminary Injunction and to Dismiss Plaintiff's Motion for Permanent Injunctive Relief, dated April 25, 1994, they had filed several prior memoranda, including the State and Local Defendants' Response in Opposition to the Tribe's Request for Permanent Injunction, dated November 23, 1992, and the State and Local Defendants' Reply to the *Amicus Curiae* Memorandum of the United States, dated December 11, 1992.

[18] The Government had also filed a prior Memorandum as *Amicus Curiae* in Support of Ute Indian Tribe's Motion for Injunctive Relief, dated November 23, 1992.

time this court set a hearing on the merits for September 12, 1994, with the proposed pretrial order to be prepared and submitted by counsel on or before August 12, 1994. *See* Minute Entry, dated August 2, 1994.[19] By stipulation of counsel, the time for filing the proposed pretrial order was extended to August 19, 1994. *See* Order, dated August 22, 1994. The proposed Pretrial Order Concerning "Indian Country" Issues was received on August 19, 1994, signed by the court on September 9, and entered on September 12, 1994, prior to the hearing on the merits.

At the September 12, 1994 hearing, arguments of counsel on the legal issues outlined in the Pretrial Order were heard at length. *See* Transcript of Hearing, dated September 12, 1994, *passim*. Noting that "with the added gloss on what was done early on, the effort to mesh those into something that makes sense, is obviously something that will require some effort," this court took the matter under advisement. *Id.* at 72:19-22.[20]

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[19] At that time, counsel for Roosevelt City made what amounted to a "speaking motion" for immediate relief from the court's September 2, 1992 Order as modified by the May 2, 1994 Order, on the theory that "it is acknowledged by the Ute Tribe and the United States and all the parties here that Roosevelt City is no longr within Indian country." Transcript of Hearing, dated August 2, 1994, at 24:17-20. Roosevelt City having filed no formal request for immediate relief, this court made no formal ruling at that time.

[20] Since that time, several individual Indian criminal defendants whose offense conduct occurred within "Indian country" as delineated in *Ute Indian Tribe* have filed motions for relief pursuant to 28 U.S.C. § 2255 (1994). In *United States v. Cuch*, 875 F.Supp. 767 (D.Utah 1995), Judge Sam ruled that the governing law concerning jurisdiction over defendant Cuch at the time of his conviction was the Tenth Circuit's *en banc* ruling in *Ute Indian Tribe* and that the *Hagen* decision did not apply retroactively to alter that result. The Tenth Circuit's decision in *Cuch*, announced March 21, 1996, affirms Judge Sam's ruling and sheds some additional light on the Tenth Circuit's reading of *Ute Indian Tribe* after *Hagen*, particularly as it pertains to cases decided before *Hagen*. More about that later. . . .

Issue Now Before This Court

At the outset, it seems worthwhile to define the particular issue or issues now in dispute, and to do so with some care. In approaching the questions raised by the parties' motions, this court has read and reread *Hagen* with some care. *Hagen* determined "that the Uintah Indian Reservation has been diminished by Congress," *i.e.*, that the original boundary of the Uintah Valley Reservation does *not* currently define the present territorial extent of federal, state and tribal jurisdiction in the Uintah Basin. 510 U.S. at 419-21, 114 S.Ct. at 970. However, the *Hagen* opinion makes no attempt to define with particularity what the current boundary *is*.

The Pretrial Order Concerning "Indian Country" Issues ("Pretrial Order"), prepared by counsel and entered by the court on September 12, 1994, identifies, *inter alia*, the following issues as currently being in dispute:

> A. In spite of *Hagen*, are the State and Local Defendants precluded as a matter of law or equity under the doctrine of collateral estoppel or otherwise, from asserting jurisdiction over the Tribe or its members within the exterior boundaries of the Uintah and Ouray Reservation, as those boundaries were defined in *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. den.* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986)?
>
> B. Although the U.S. Supreme Court denied the Tribe leave to intervene as a party in *Hagen*, is the Supreme Court's decision binding on the Tribe and its members in this action under the doctrine of *stare decisis* or otherwise?
>
> C. In light of *Hagen*, do any or all of the following categories of fee land constitute "Indian Country" under 18 U.S.C. § 1151: (a) land that was apportioned to the "Mixed-Blood" Utes under the Ute Partition Act; (b) lands allotted to individual

> Indians that have passed into fee status after 1905; and (c) lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status by the Tribe for then-fee (now trust) lands in an effort to consolidate its land holdings[?]

Id. at 14-15. Before reaching the issues addressed in Paragraphs 5.A and 5.B of the Pretrial Order, it makes sense to examine to what extent the decision of the United States Supreme Court in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), stands in genuine conflict with the Tenth Circuit's *en banc* ruling in *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). The res judicata, collateral estoppel or other binding effect of the Tenth Circuit's judgment in *Ute Indian Tribe* comes into question in this proceeding only insofar as *Ute Indian Tribe* and *Hagen* cannot be reconciled. The land category issues identified in Paragraph 5.C of the Pretrial Order would also appear to be subsumed within this more fundamental question.

The Uintah Reservation Boundaries After *Hagen*

Let us begin with those questions as to which *Ute Indian Tribe* and *Hagen* are in accord—those issues which are *not* in dispute. First, there is no question that the jurisdiction of the Ute Indian Tribe encompasses all of the lands now held in trust by the United States for the benefit of the Tribe and its members, or where Indian allotments are concerned, lands now held in trust for the benefit of individual Ute allottees. *See* Pretrial Order Concerning "Indian Country" Issues, dated September 12, 1994, at 13 ¶ 3.M. Altogether, this represents approximately 1.2 million acres of land. Nor did *Hagen* address the Tenth Circuit's determination in *Ute Indian Tribe* that the 1905 national forest withdrawals of approximately 1,010,000 acres of reservation land did not diminish the

Uintah Reservation boundaries. *Hagen* also makes no ruling concerning the boundaries of the Uncompahgre Reservation, the original extent of which was reaffirmed by the Tenth Circuit. The Ute Indian Tribe suggests that "the legal status of the non-opened lands on the Uintah Valley Reservation and all of the lands on the Uncompahgre Reservation remain[s] as established by the Tenth Circuit in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994[, 107 S.Ct. 596, 93 L.Ed.2d 596] (1986)." Brief of Ute Indian Tribe, at 2 n. 4; *see id.* at 15 n. 19. *Accord, State of Utah v. Perank*, 858 P.2d 927, 934 (Utah 1992).

The present controversy thus "centers on whether the State or the Tribe and federal government have jurisdiction over the various categories of *non-trust*, i.e., fee, lands within the Uintah Valley Reservation," (Brief of Ute Indian Tribe at 15 (emphasis added & footnote omitted)), and therefore concerns the extent to which *Hagen* supplants *Ute Indian Tribe*'s reaffirmation of continuing federal and tribal jurisdiction within the Reservation's original exterior boundaries.

The United States, appearing in this proceeding as an *amicus curiae*, attempts to minimize the practical impact of *Hagen* on the jurisdictional landscape mapped in *Ute Indian Tribe:* because the 1905 Act expressly provided that the "unallotted lands . . . shall be disposed of under the general provisions of the homestead and townsite laws of the United States," the reservation was diminished only to the extent of the lands "actually entered by non-Indians under the 1905 Act and not subsequently reacquired by the Tribe and taken into trust status." United States' Memorandum, dated July 29, 1994, at 9. Moreover, "any parcels of land, though currently held in fee, that were never opened to non-Indian settlement under the 1905 Act remain 'Indian country'." *Id.* at 13.[21]

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[21] According to the Government, "This category includes those fee lands that were initially Indian allotments that have become

The Tribe joins the Government in asserting that *Hagen*'s "only effect is to separate from 'Indian country' those lands that were *actually settled* pursuant to the 1905 Presidential Proclamation," noting that "the present disagreement centers on whether the State or the Tribe and federal government have jurisdiction over the various categories of non-trust, i.e., fee, lands within the Uintah Valley Reservation." Brief of Ute Indian Tribe at 13, 15 (emphasis added). The Tribe identifies four categories of non-trust land within the Reservation:

> (1) lands that passed from trust to fee status under the 1905 Presidential Proclamation; (2) lands that were initially allotted to tribal members under the Act of May 27, 1902, ch. 888, 32 Stat. 245, which have since passed into fee status (whether owned by an Indian or non-Indian); (3) 211,430 acres of land . . . that were distributed to former members of the Tribe under the Ute Partition Act . . .; and (4) former trust lands that passed into fee when they were exchanged by the Tribe for fee lands under the Indian Reorganization Act . . . and [the] Indian Land Consolidation Act. . . .

Id. at 16 (citations omitted). According to the Tribe, only the first category of non-trust lands are no longer "Indian country" within the meaning of 18 U.S.C.A. § 1151 (1984). The Tribe even points to language in the Utah Supreme Court's opinion in *Perank* as support for this view: " 'The only issue in this case . . . is whether the unallotted and unreserved lands that *were opened to entry in 1905* and not later restored to tribal ownership and jurisdiction . . . are within the present boundaries of the Reservation.' " *Id.* at 18 (quoting *Perank*, 858 P.2d at 934 (emphasis supplied by the Tribe; footnote omitted)).

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fee under a number of circumstances, as well as those lands that were distributed in fee status to former members of the Tribe or others under the Ute Partition Act, 25 U.S.C. §§ 677-677aa." *Id.*

Setting aside for a moment the semantic distinction between lands that "were opened to entry" under the 1905 Act (*Perank*) and lands that were "actually settled" (Tribe), the Tribe correctly points out that on their facts, both *Perank* and *Hagen* addressed conduct occurring in Myton, Utah, "which was established within the original boundaries of the Uintah Indian Reservation when the Reservation was opened to non-Indian settlement in 1905." *Hagen*, 510 U.S. at 408, 114 S.Ct. at 964. Indeed, Myton was established by Presidential Proclamation, together with the towns of Duchesne and Randlett. *See* 34 Stat. 3139, 3142. Plats of the Reserved Townsite of Myton were approved on September 13, 1905, by the United States General Land Office and on August 26, 1919, by the United States Surveyor General.[22] Thus Myton comes within the first category of non-trust lands listed by the Tribe, at least as to lands patented in fee, and in its entirety as lands "opened to entry" under *Perank*.

"Indian country" within the meaning of 18 U.S.C.A. § 1151(a) (1984) encompasses "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." Thus, non-trust, or fee lands may be found within "Indian country" so long as there are identifiable "limits of any Indian reservation" embracing those lands.[23] Neither *Hagen* nor *Perank* determined the "Indian country" status of non-trust lands falling into any of the other three categories listed by the Tribe, or in Paragraph 5.C of the Pretrial Order because

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[22] *See* Defendants' Memorandum at 25 n. 19.

[23] As the Tenth Circuit has recently observed, "both the Supreme Court and this Court have concluded § 1151 defines Indian country for both civil and criminal jurisdiction purposes." *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540-1541 & n. 10 (10th Cir.1995).

neither case involved conduct occurring on those lands. The Tribe and the United States suggest that the three remaining categories of non-trust lands not before the Court in *Hagen* remain "Indian country" because they are within the Uintah Reservation's "limits" for purposes of § 1151(a).

The State and Local Defendants emphatically dispute the theory advanced by the Tribe and by the United States: "If the boundaries *were* diminished, then it was recognized by all involved that tribal jurisdiction necessarily was limited to trust lands. . . . Once this diminishment of the exterior boundaries occurred, lands leaving trust status for any reason lost their status as 'Indian country' under 18 U.S.C. § 1151(a)." Defendants' Memorandum at 12 (emphasis in original).[24] In essence, the State and Local Defendants now argue that the Uintah Reservation was wholly terminated or extinguished by the 1902 Act and that thereafter no discrete, definable reservation boundaries exist. For purposes of § 1151(a), then, the only existing "limits" of the Uintah Reservation after 1905 are those that distinguish Indian lands held in trust from Indian and non-Indian lands held in fee. Indeed, this " 'Indian country' equals trust lands" equation represents the central thrust of the Defendants' arguments in this proceeding.

The Uintah Reservation: "Diminished" or "Terminated"?

As is so often the case, the problem confounding court and counsel proves to be largely one of semantics. When

[24] The defendants hasten to point out that in addressing the question before the Supreme Court in *Hagen*, both the petitioner and the Tribe argued that a finding of "diminishment" would divest the Tribe and the United States of jurisdiction over the non-trust lands. *Id.* at 13-14. This would indeed be the case had the Court found *the entire reservation* to have been "disestablished," or "terminated," as in *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

Hagen speaks of the "question whether the Uintah Reservation has been *diminished*," that is, "made smaller; lessened; reduced . . ." (*Webster's New World Dictionary* 386 (3d coll. ed. 1991)), the terminology itself implies a continued existence, albeit reduced in size, according to commonly understood usage. In essence, the Tribe and the United States argue that the limits of the Uintah Reservation have been "diminished" by being reduced only to the extent of issuance of fee patents resulting from non-Indian settlement under the 1905 Act. Conversely, the State and Local Defendants argue that the limits of the Uintah Reservation have been "diminished," that is, *extinguished*, rendering § 1151(a) inapplicable to all four disputed categories of non-trust lands. The concept urged by the State and Local Defendants may more accurately be termed the *disestablishment* of a reservation, *i.e.*, "to deprive of the status of being established," (*id.* at 393), or its *termination*, *i.e.*, "the end of something in space and time," (*id.* at 1381), rather than a genuine diminishment. *See also Ute Indian Tribe*, 521 F.Supp. at 1085-1092.[25]

Yet when winnowed down to its precise holding, *Hagen* says this:

> [W]e hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation. . . .

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[25] The word *terminate* has also been used in this context. *See, e.g., Mattz v. Arnett*, 412 U.S. 481, 495, 93 S.Ct. 2245, 2253, 37 L.Ed.2d 92 (1973) ("A congressional determination to terminate [a reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."); *DeCoteau v. District County Court*, 420 U.S. 425, 444-45, 95 S.Ct. 1082, 1092-93, 43 L.Ed.2d 300 (1975) ("the Lake Traverse Reservation was terminated in 1891").

510 U.S. at 414, 114 S.Ct. at 967.[26] Thus, the discontinuation of reservation status, or "diminishment" of the Reservation, was effective *"with respect to those lands,"* plainly referring to the "unallotted reservation lands," the lands restored to the public domain and "opened to entry" and settlement pursuant to the 1902-1905 Acts.

Justice O'Connor's phrasing of the holding in *Hagen* parallels Justice Stewart's framing of the statutory construction issue in *Perank:* "whether the language of the Act of May 27, 1902, which provided that the unallotted lands were to be 'restored to the public domain,' if used as operative statutory language opening a reservation

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[26] The State and Local Defendants quote the next sentence of the *Hagen* opinion, supplying emphasis as indicated:

> Indeed, we have found only one case in which a Federal Court of Appeals decided that statutory restoration language did not *terminate* a reservation, *Ute Indian Tribe*, 773 F.2d at 1092, a conclusion the Tenth Circuit has since disavowed as "unexamined and unsupported." *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400, *cert. denied*, 498 U.S. 1012, 111 S.Ct. 581, 112 L.Ed.2d 586 (1990).

Defendants' Memorandum at 16 (quoting *Hagen*, 510 U.S. at 414, 114 S.Ct. at 967). Of course, Justice O'Connor is citing to the portion of *Ute Indian Tribe* opinion discussing the restoration of the *Uncompahgre Reservation* to the public domain in the 1894 and 1897 Acts—not the opening of the Uintah Reservation in 1905. *Compare* 773 F.2d at 1090-1093 ("III. THE UNCOMPAHGRE RESERVATION") *with id.* at 1088-1089 ("II. THE UINTAH ISSUE"). Likewise, the reference in *Yazzie* to the "unexamined and unsupported" conclusion in *Ute Indian Tribe* concerns only the 1985 ruling as to the Uncompahgre Reservation. *Yazzie* recounts the analysis of the opening of the Uintah Reservation in favorable terms, restating its conclusion that "restoration language was not the operative language of the statute being construed," *viz.*, the 1905 Act. *Yazzie*, 909 F.2d at 1399-1400.

This distinction is also lost upon Wendy L. Slater, *"Pulling up the Nails" from the Uintah Indian Reservation Boundary: Hagen v. Utah*, 28 CREIGHTON L.REV. 529, 546 (1995) ("The court noted that its decision in *Ute* was 'unexamined and unsupported in the opinion.' " (footnote omitted)).

would effect a diminishment of that reservation *as to the lands so restored.*" 858 P.2d at 934 (emphasis added). Justice Stewart articulated the court's holding in *Perank* in like terms: "We hold that the restoration language in the 1902 Act established the necessary congressional intent to diminish the Reservation *as to those lands restored to the public domain* and that the restoration language in the 1902 Act remained operative statutory language when the Reservation was opened in 1905." *Id.* (emphasis added).

As this court noted when first addressing the boundary issue in 1981, there exists a canon of statutory construction in reservation boundary cases "forbidding any assumption 'that Congress would intend to change the reservation to an area without defined boundaries and, in addition, create a confusing checkerboard pattern of jurisdiction.' " *Ute Indian Tribe,* 521 F.Supp. at 1154 (quoting *United States v. Long Elk,* 565 F.2d 1032, 1039 (8th Cir.1977)). Yet the State and Local Defendants suggest that in construing the 1905 Act opening the Uintah Reservation in *Hagen,* the Supreme Court assumed exactly that.

Nothing in the legislation pertaining to the Uintah Reservation expresses a congressional purpose to extinguish or terminate the Uintah Reservation in its entirety. Rather, Congress expressly provided that the Utes would retain more reservation land than merely their individual allotments. As *Hagen* explains, "A month after the passage of the 1902 Act, Congress directed the Secretary of the Interior to set apart sufficient land to serve the grazing needs of the Indians remaining on the Reservation. J.Res. 31, 57th Cong., 1st Sess. (1902), 32 Stat. 744." 510 U.S. at 404, 114 S.Ct. at 962 (footnote omitted). In Congress' own words, the Secretary was directed to "select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live

stock." In 1903, Congress again addressed the reservation grazing lands, limiting the selection to "the lands south of the Strawberry River on said Uintah Reservation" and providing that the lands "shall not exceed two hundred and fifty thousand acres. . . ." Act of March 3, 1903, ch. 994, 32 Stat. 998. The 1905 Act "repealed the provision of the 1903 Act limiting the grazing lands to areas south of the Strawberry River," (*Hagen*, 510 U.S. at 406, 114 S.Ct. at 963), leaving the reserved grazing lands requirement otherwise intact. Act of March 3, 1905, ch. 1479, 33 Stat. 1069. Thus, in the opening legislation affecting the Uintah Reservation, Congress visualized an "unopened" portion of the Reservation consisting not only of individual Indian allotments but also of a quarter-million acres of grazing land "for the use in common of the Indians of that reservation." [27] Even the oft-quoted 1903 "councils" of Indian Inspector James McLaughlin with the Utes residing on the Uintah Reservation acknowledge this:

> [INSPECTOR McLAUGHLIN]: You say that [reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but [C]ongress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation. *Each of you will have a boundary to your individual holdings and there will also be a border to that 250,000 acre tract set apart for pasturage.* You fear that you are going to be confined to the tract of land allotted. That is not so, . . . [W]hen you take your allotments you can travel

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[27] In *Perank*, Justice Stewart noted that "[t]he allotments to individual Indians under the 1902 Act and the lands reserved for grazing and other purposes set aside for the Tribe by a 1902 Joint Resolution and the 1903 and 1905 Acts make up approximately 360,000 acres." 858 P.2d at 934 n. 10.

> like white men and you will not need a pass. *Your Agency will be continued just the same as now; the Agent will have full jurisdiction just the same as now, to protect your interests,* and as citizens you will have the protection of the laws of the state to redress injuries against you.

JX 162 at 42-45 (emphasis added) (quoted in Brief for the Respondent, *Hagen v. Utah,* 1993 WL 384805, at Appendix C, at 5a-6a).

Nowhere in *Hagen* or *Perank* does either court find that the Uintah Reservation was "disestablished" or "terminated" altogether or conclude, as the Supreme Court did twenty years earlier in *DeCoteau*, that "the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs" and that the reservation itself was terminated. 420 U.S. at 446, 95 S.Ct. at 1094. To the contrary Justice Stewart observed in *Perank* that "all parties agree that *the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use.*" 858 P.2d at 934 (emphasis added). Thus the Uintah Reservation, though dramatically reduced in size, continued to exist after 1905 as an Indian reservation with definable "limits" within the meaning of 18 U.S.C. § 1151(a), and the lands encompassed by its diminished boundaries remain within "Indian country" under the statute.

Judge Monroe McKay, writing for the court of appeals in *Chickasaw Nation v. State ex rel. Oklahoma Tax Comm'n,* 31 F.3d 964 (10th Cir.1994), *affirmed in part, reversed in part on other grounds and remanded,* —— U.S. ——, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995), expressed this same view:

> In *Hagen,* the Court concluded that the Uintah reservation had been "diminished" by various acts of Congress, and that therefore a town originally within the

> reservation was now outside the reservation and subject to state criminal jurisdiction. Notwithstanding the diminishment of the Uintah reservation in *Hagen*, there was no question but that *the land within the diminished reservation retained its status as Indian country*.

31 F.3d at 976 n. 8 (emphasis added).[28] Even more recently, in *United States v. Cuch*, 79 F.3d 987 (10th

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[28] The State of Utah argues that *Chickasaw Nation* in fact ratifies its "Indian country-equals-trust lands" equation and that Judge McKay's reference to "land within the diminished reservation" speaks only of trust lands—wholly consistent with the State's theory of wholesale disestablishment. *See* Transcript of Hearing, September 12, 1994, at 20:14-21:12 (Mr. Andrews).

Judge McKay's opinion echoes the Supreme Court's holding in *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993), that the limits imposed by *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), and its progeny upon a state's power to tax the income of tribal members "applies to all Indian country, and not just formal reservations," and that the crucial question is "whether the relevant tribal members live in Indian country—whether the land is within reservation boundaries, on allotted lands, or in dependent communities." 508 U.S. at 125, 126, 113 S.Ct. at 1991, 1992. *Sac and Fox* to tax, citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), a case involving Indian tribal trust lands located outside of a formal reservation. *Id.* at 124-25, 113 S.Ct. at 1991. "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, . . ." *Sac and Fox, Id.* at 123, 113 S.Ct. at 1990.

Indian Country, U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir.1987), *cert. denied*, 487 U.S. 1218, 108 S.Ct. 2870, 101 L.Ed.2d 906 (1988), expressly equates "reservation" lands with "[T]ribal lands, trust lands, or certain allotted lands," with reference to their common status as "Indian country" under 18 U.S.C. § 1151. Nothing in *Indian Country, U.S.A.* asserts that "reservation" or "Indian country" status under 18 U.S.C. § 1151(a) is dependent on or limited by Indian title or trust status. Nor does it suggest that once Indian tribal or trust land acquires "Indian country" status under § 1151(a), subsequent "issuance of any patent"

Cir.1996), the Tenth Circuit described the effect of *Hagen* in these terms: "[t]he *Hagen* decision effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, *redefined the Reservation boundaries* resulting from our earlier decision, and conclusively settled the question." *Cuch*, 79 F.3d at 989 (emphasis added). Judge Stephen Anderson, writing for the court of appeals in *Cuch*, reads *Hagen* as holding that "the state had jurisdiction to prosecute Hagen because Congress had diminished the Uintah Reservation in the early 1900s." *Id.* In this context, *diminishment* "redefined the Reservation boundaries" previously established in *Ute Indian Tribe*, but with no indication that the Uintah Reservation was terminated or disestablished altogether.

In this respect, *Rosebud Sioux Tribe v. Kneip* also proves instructive. In *Rosebud*, the Court speaks of a reservation *diminished* (430 U.S. at 585, 586, 587, 588, 594, 598, 611, 614, 97 S.Ct. at 1362, 1362, 1363, 1363, 1367, 1369, 1375, 1377), of the *diminution* of a reservation by restoration of "opened" unallotted lands (*id.* at 592 597, 602, 97 S.Ct. at 1366, 1368, 1371), of the *disestablishment* of a particular county "from the Rosebud Reservation," (*id.* at 601, 603, 609, 97 S.Ct. at 1370, 1371, 1374), of congressional intent "to exclude Gregory County from the Rosebud Reservation," (*id.* at 603, 97

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in fee to § 1151(a) lands somehow divests the patented lands of "Indian country" status.

In footnote 8 of *Chickasaw*, Judge McKay quoted the *Indian Country, U.S.A.* opinion for the proposition that "[t]ribal lands, trust lands, and certain allotted lands generally remain Indian country despite disestablishment." 829 F.2d at 975 n. 3 (Seymour, J.). In then observing that under *Hagen* "the land within the diminished reservation retained its status as Indian country," this court reads Judge McKay to be referring to land within *an existing reservation* "[n]otwithstanding the diminishment." Footnote 8 thus distinguishes "the diminished reservation" from "[t]ribal lands, trust lands, and certain allotted lands" following "disestablishment," rather than equating the two.

S.Ct. at 1371), or "to disestablish the affected [opened, unallotted] areas." *Id.* at 613, 97 S.Ct. at 1376. At page 599, 97 S.Ct. at page 1369 of the *Rosebud* opinion, the Court notes that "[h]ere, for example, unlike the situation in *DeCoteau,* we are not faced with an Act which, if it disestablished the area under question, *would terminate the entire reservation,* 420 U.S., at 446-447, [95 S.Ct., at 1094]." *Id.* at 599 n. 20, 97 S.Ct. at 1369 n. 20 (emphasis added).[29]

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[29] The distinction between *DeCoteau* and *Rosebud* in this regard has been pointed out by the Eighth Circuit:

> The Indian conduct in *DeCoteau* did occur on non-Indian, unallotted land within the 1867 reservation boundaries. *DeCoteau v. District County Court, supra,* 420 U.S. at 428, 95 S.Ct. at 1082. However, the Supreme Court also concluded that as to this particular land, reservation status had been terminated by the Congressional Act of March 3, 1891, c. 543, 26 Stat. 1035. *DeCoteau v. District County Court, supra,* 420 U.S. at 444-445, 95 S.Ct. 1082. Appellant cites no statute similarly disestablishing the reservation status of Todd County in the Rosebud Reservation.
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> . . . .
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> Judge Blackmun in the first *Beardslee* appellate opinion concluded from his research that "(o)nly three Acts of Congress have affected the territory of the reservation since its establishment in 1889 and none of these concern Todd County. * * * No part of the Todd County portion of the reservation has ever been formally opened." *Id.* at 285. Similarly last year in *Rosebud Sioux Tribe v. Kneip,* 521 F.2d 87 (8th Cir.1975), cert. granted, [425] U.S. [989], 96 S.Ct. 2199, 48 L.Ed.2d 814 (1976), where the court dealt with the South Dakota counties of Gregory, Tripp, Lyman, and Mellette, it also added that: "Todd County remains unopened." *Id.* at 88 n. 1 (emphasis added).

Beardslee v. United States, 541 F.2d 705, 707, 708 (8th Cir.1976). *See also, United States v. Long Elk,* 565 F.2d 1032, 1037, 1038 (8th Cir.1977) (*Rosebud* concluded that "Congress clearly intended to diminish the size of the Rosebud Reservation" and "disestablished the designated portions of the reservation"); *United States ex rel. Cook v. Parkinson,* 525 F.2d 120, 123 (8th Cir.1975) ("[t]he phrase 'diminished reservation' was interpreted [by the Eighth

Rosebud concluded that the language of the Act of April 23, 1904, ch. 1484, 33 Stat. 254, the Act of March 2, 1907, ch. 2536, 34 Stat. 1230, and the Act of May 30, 1910, ch. 260, 36 Stat. 448, affecting the Rosebud Reservation "not only opened the land for settlement, but diminished the boundaries of the Reservation *pro tanto*." 430 U.S. at 588, 97 S.Ct. at 1363 (footnote omitted).[30] "The intent of Congress in the 1904, the 1907, and the 1910 Acts was *to change the boundaries of the original 1889 Rosebud Reservation*." *Id.* at 615, 97 S.Ct. at 1377 (emphasis added).

Rosebud illustrates the fact that reservation diminishment is not necessarily the either-or, all-or-nothing, win-or-lose proposition asserted in this proceeding by the State and Local Defendants. In referring to the Uintah Reservation as being *diminished* "with respect to those [unallotted and unreserved] lands," *Hagen* uses the term in the commonly understood sense of being "made smaller, lessened or reduced," as the Court did in *Rosebud*. *See also White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527, 534 (D.Minn.1981) (White Earth Chippewa Reservation diminished by cession of four-township tract; remaining thirty-two township reservation area not disestablished), *affirmed*, 683 F.2d 1129 (8th Cir. 1982), *cert. denied*, 459 U.S. 1070, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982).

Hagen also contrasts with *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir.), *cert.*

Circuit] to mean in *Rosebud* that the reservation was reduced geographically"); *Black Hills Institute v. United States Department of Justice*, 812 F.Supp. 1015, 1019 (D.S.D.1993) ("*Rosebud* was a case involving congressional intent as to the disestablishment *of a part of the reservation*" (emphasis added)).

[30] *pro tanta*—"a defensible Latinism commonly used in the law" meaning "to that extent; as far as it goes." BRYAN A. GARNER. A DICTIONARY OF MODERN LEGAL USAGE 708 (2d ed. 1995). *Accord*, BLACK'S LAW DICTIONARY 1100 (5th ed. 1979) ("for so much; for as much as may be; as far as it goes.")

denied, 498 U.S. 1012, 111 S.Ct. 581, 112 L.Ed.2d 586 (1990), in which the court of appeals found that the reservation status of a 1907-08 addition to the Navajo Reservation was terminated by language in a 1908 Act as well as 1908 and 1911 Executive Orders which restored the unallotted lands to the public domain. Finding that the 1907-08 "reservation" had been made by Executive Order for the limited purpose of providing allotments to individual Indians, the Tenth Circuit explained: "Especially when a reservation addition is made only for the limited purpose of allotments of some of the land to individual Indians in severalty, the reservation is terminated when the lands are allotted and the remainder restored to the public domain." 909 F.2d at 1420. Therefore, having been made for that limited purpose, the 1907-08 addition to the Navajo Reservation was entirely "*unlike cases where reservation status was created by treaty or statute, or by EO for purposes broader than mere allotments in severalty*," (*id.* (emphasis added))—cases such as the Uintah Reservation, created by Executive Order in 1861 and Act of Congress in 1864 and "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63. Nothing in *Yazzie* even hints that the termination of the 1907-08 addition affected the boundaries of the remainder of the Navajo Reservation in any way whatsoever.

The 1902-1905 Acts were not the first time that the Uintah Valley Reservation had been diminished by a restoration of particular lands to the public domain. Section 1 of the Act of May 24, 1888, ch. 310, 25 Stat. 157, declared a 7,040-acre parcel known as the Gilsonite Strip "to be public lands of the United States and restored to the public domain." It was clearly understood at that time that the restoration of the Gilsonite Strip to the public domain represented a diminishment of the Reservation.[31]

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[31] A November 18, 1895 letter from the Commissioner of Indian Affairs to the Secretary of the Interior commented that the 1888

It was equally plain that the balance of the Reservation not so restored remained intact as a reservation. *See Ute Indian Tribe*, 521 F.Supp. at 1098-1100.

The view expressed in *Perank* that "the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use," corresponds with subsequent congressional treatment of the matter, including references in legislative materials to "the exterior boundary of the Uintah and Ouray Reservation." *See Ute Indian Tribe*, 521 F.Supp. at 1133-1134. Moreover, the boundaries of the Uintah Reservation, though reduced in 1905, were not then frozen in place; they became the subject of further legislative adjustments. *See Perank*, 858 P.2d at 934 & n. 10.

In the aftermath of the demise of the Indian allotment policy, Congress and the United States Department of the Interior have taken steps to restore thousands of acres of vacant "opened" lands to the Reservation. Section 3 of the Wheeler-Howard Act, or Indian Reorganization Act of 1934,[32] 25 U.S.C.A. §463 (Supp.1996), reads in part:

> [t]he Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States,

provided that valid existing claims are not affected. On August 25, 1945, Secretary of the Interior Harold Ickes issued an Order of Restoration directing that the "undis-

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Act "had been fully executed in accordance with its intent so far as the securing of the consent of the Indians to *the diminution of their reservation* and the restoration of said strip of land to the public domain, . . ." *Ute Indian Tribe*, 521 F.Supp. at 1100 (emphasis added).

[32] Act of June 18, 1934, ch. 576, 48 Stat. 984.

posed-of opened lands of the Uintah and Ouray Reservation . . . are hereby restored to tribal ownership for the use and benefit of the Ute Indian Tribe . . ., and *are added to and made a part of the existing reservation*, subject to any valid existing rights." 10 Fed.Reg. 12409 (1945) (emphasis added).[33] Further, the Act of March 11, 1948, ch. 108, 62 Stat. 72, expressly provided that "the exterior boundary of the Uintah and Ouray Reservation . . . for the benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation, is hereby extended to include the following area: . . .," followed by a lengthy legal description encompassing an area of grazing lands known as the Hill Creek Extension.

If, as the State and Local Defendants now suggest, the "Uintah and Ouray Reservation" consists merely of an aggregation of parcels of Indian trust lands, why did Congress speak of extending the Reservation's "exterior boundary"? Congress in 1948 was aware of the distinction. Three months after extending the Reservation boundaries to embrace the Hill Creek Extension, "Congress uncouple[d] reservation status from Indian ownership, and statutorily define[d] Indian country to include lands held

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[33] As acknowledged by the parties in this proceeding, "Regardless of whether the original reservation was diminished, . . . opened lands that have been restored to reservation status by subsequent Acts of Congress, see *e.g.*, Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. § 461 *et seq.* (1982 ed.) (authorizing the return of opened lands to the original reservations)), fall within the exclusive criminal jurisdiction of federal and tribal courts under 18 U.S.C. §§ 1152, 1153." *Solem*, 465 U.S. at 467 n. 8, 104 S.Ct. at 1164 n. 8.

Similarly, the 1983 panel opinion in *Ute Indian Tribe*, referring to the 1945 Order of Restoration, observed: "Neither party disputes that the restorations accomplished pursuant to § 463 of 25 U.S.C. made them part of the reservation. We agree. This restoration included about 217,000 acres." 716 F.2d 1298, 1312-1313 (10th Cir. 1983) (Seth, C.J.). *Accord*, *Perank*, 858 P.2d at 950 ("[T]he return of those lands to the reservation would enlarge the boundaries of the reservation. *See Solem*, 465 U.S., at 467-68, [104 S.Ct. at 1164,] . . .").

in fee by non-Indians within reservation boundaries. *See* Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (1982 ed.))." *Solem*, 465 U.S. at 468, 104 S.Ct. at 1164.

The State and Local Defendants' contention that *Hagen* leaves the Uintah Valley portion of the Uintah and Ouray Reservation "an area without defined boundaries" cannot survive careful scrutiny of the operative language of the 1902 Act and subsequent legislation, particularly when read in light of the explicit holding of the *Hagen* case, buttressed by the consistent language of the *Perank* opinion. Because "the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use," and also as to lands later restored to the Reservation by congressional or administrative action (*see Perank*, 858 P.2d at 934), the State and Local Defendants' simplistic " 'Indian country'-equals-trust lands" equation cannot accurately define the jurisidctional landscape of the Uintah Reservation, even as diminished.[34] Other cases involving terminated or wholly disestablished reservations having only scattered allotments remaining (*e.g., DeCoteau, Yazzie*) are simply inapposite to the case at bar.

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[34] Particularly as to tribal lands held in trust, the defendants' assertion that "Indian country" status ends "when lands leave trust status" (Defendants' Memorandum at 20) appears to repudiate the express terms of the statute, 18 U.S.C. § 1151(a), in favor of earlier definitions under which "Indian country" included "only those lands in which the Indians held some form of property interest. . . ." (*Solem*, 465 U.S. at 468, 104 S.Ct. at 1164), and where land continued to be Indian country "so long as the Indians had the title to it, and no longer." *Bates v. Clerk*, 95 U.S. 204, 208, 24 L.Ed. 471 (1877). As the Court pointed out in *Solem*, Congress "uncouple[d] reservation status from Indian ownership" by enacting 18 U.S.C. § 1151(a) in 1948. 465 U.S. at 468, 104 S.Ct. at 1164. As to lands held by the United States in trust for a tribe, the court can find no authority suggesting that a finding of diminishment alters the language or effect of § 1151(a) in any way. *See* pages 1498-1500 *infra*.

Extent of the 1905 Diminishment of the Uintah Reservation

In *Perank*, Justice Stewart wrote, "The only issue in this case . . . is whether the unallotted and unreserved lands that were opened to entry in 1905 and not later restored to tribal ownership and jurisdiction by the 1945 'Order of Restoration' are within the present boundaries of the Reservation, (858 P.2d at 934)—which brings us back to the distinction between lands "opened to entry in 1905" and opened lands "actually settled" under the 1905 Act.

The narrower reading proffered by the Tribe and the United States as to the effect of *Hagen*—lands "actually settled" under the 1905 Act—harmonizes with this court's original treatment of the 1905 Act, *viz.*, as legislation having some substantive effect *vis-a-vis* the 1902 Act. *See Ute Indian Tribe*, 521 F.Supp. at 1123-1132. It strikes a more dissonant chord when contrasted with the reading given the 1905 Act in the *Hagen* and *Perank* opinions. Both *Hagen* and *Perank* read the 1902 Act as restoring *all* unalloted and otherwise unreserved lands within the Uintah Reservation to the public domain. Further, both *Hagan* and *Perank* read the 1905 Act as making no substantive change in the operation of restoration language of the 1902 Act.[35] Indeed, it is on this precise point that

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[35] The *Hagen* majority limits the effect of the 1905 Act by minimizing its purpose: "[A]lthough we have no way of knowing for sure why the Senate decided to limit the 'manner' of opening, it seems likely that Congress wanted to limit land speculation. That objective is not inconsistent with the restoration of the unallotted lands to the public domain. . . ." 114 S.Ct. at 969. As this court observed the first time around. Senator Henry M. Teller of Colorado, a leading architect of the Senate language adopted in the 1905 Act, "had long opposed the allotment of Indian lands and *wholesale opening of reservations to white settlement under the allotment* bills, charging that such legislation was in the interests of non-Indian land speculators." *Ute Indian Tribe*, 521 F.Supp. at 1131 (emphasis added; citations & footnote omitted). Concerning an earlier Indian allotment bill, Senator Teller remarked:

> This is a bill that, in my judgment, ought to be entitled "A bill to despoil the Indians of these lands and to make them

Perank and *Ute Indian Tribe* disagree, and the United States Supreme Court granted certiorari in *Hagen* expressly "to resolve the direct conflict between these decisions of the Tenth Circuit and the Utah Supreme Court on the question whether the Uintah Reservation has been diminished." 510 U.S. at 409, 114 S.Ct. at 964.

Through and including *Hagen*, the Supreme Court's line of reservation boundary cases invoke two rules of statutory construction: that "the statutory language must 'establis[h] an express congressional purpose to diminish,'" (510 U.S. at 411, 114 S.Ct. at 965 (quoting *Solem*, 465 U.S. at 475, 104 S.Ct. at 1168), and that "[t]roughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment." *Id.* (citing *Solem*, 465 U.S. at 470, 472, 104 S.Ct. at 1166, 1167) *Hagen* quotes *South Dakota v. Bourland*, 508 U.S. 679, 687, 113 S.Ct. 2309, 2316, 124 L.Ed.2d 606

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vagabonds on the face of the earth," because in my view, that is the result of this kind of legislation.

11 Cong.Rec. 934 (Jan. 20, 1881) (remarks of Sen. Teller).

Ironically, By relying on its own limiting assumptions concerning congressional purpose, the *Hagen* majority reads the 1905 Act as providing in effect that "so much of said lands *as will be under the provisions of said acts restored to the public domain* shall be open to settlement and entry" under the homestead and townsite laws—precisely the language of the House bill rejected by Congress in 1905 in favor of the Senate version, which deliberately omitted the public domain language. *See* 114 S.Ct. at 979-980 (Blackmun, J., dissenting); *see also Ute Indian Tribe*, 521 F.Supp. at 1127-1132 & nn. 168-173A.

Nevertheless, having once determined that the 1905 Act did not alter the effect of the restoration language found in the 1902 Act and that the 1902 Act—not the 1905 Act—operated to diminish the Reservation, it seems doubtful at best that the *Hagen* majority would turn to the 1905 Act rather than the 1902 Act to define the territorial extent of that same diminishment. The specific tracts which were in fact entered and "settled" under the 1905 Act would thus be subsumed within the broader congressional directive that "all the unallotted lands within said reservation shall be restored to the public domain." Act of May 27, 1902, ch. 888, 32 Stat. 263.

(1993), which in turn quotes *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992), for the broader proposition that " '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' " 502 U.S. at 269, 112 S.Ct. at 693 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985)).

When contrasted with the Court's disposition of substantive issues affecting Indians in its more recent cases, however, it remains unclear how much substantive impact these lofty expressions really have.[36] Indeed, the new interpretive "canon" articulated in *Hagen, viz.*, that legislation affecting Indian reservations should not be construed in such a fashion as "would seriously disrupt the justifiable expectations of the [non-Indian] people living in the area," 510 U.S. at 421, 114 S.Ct. at 970.[37] seems to rewrite the

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[36] Of course, reliance on "canons of construction" as presaging a particular substantive result always proves to be somewhat problematic. *See, e.g.*, Karl N. Llewellyn, *Remarks of the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND.L.REV. 395 (1950) ("Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially by means other than the use of the canon. . . ."). The canons themselves may simply represent shorthand expressions of more fundamental values, policies and perceptions as to institutional role. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV.L.REV. 26 (1994), *and generally* HORACE E. READ, JOHN W. MCDONALD, JEFFERSON B. FORDHAM & WILLIAM J. PIERCE, MATERIALS ON LEGISLATION 744-948 (4th ed. 1982).

[37] Using a *"Cf."* signal, the majority opinion cites only to *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605, 97 S.Ct. 1361, 1372, 51 L.Ed.2d 660 (1977), as authority supporting this interpretive principle. The *"Cf."* signal denotes that the cited authority *"supports a proposition different from the main proposition but sufficiently analogous to lend support."* HARVARD LAW REVIEW ASSOCIATION, ET AL., THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 23 (15th ed. 1991) (emphasis in original). The referenced pages of the

traditional principle that " 'doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith," [38] so as to give greater deference to the Tribe's more numerous non-Indian neighbors than to the Indians themselves.[39] *See also* Lauren N. Soll, *The Only Good*

Rosebud opinion point to "the unquestioned actual assumption of state jurisdiction over the unallotted lands . . . since the passage of the 1904 Act" (430 U.S. at 603) as evidence corroborating a finding of reservation diminishment:

> The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges.

430 U.S. at 604-05, 97 S.Ct. at 1372 (footnote omitted). *Rosebud* itself does not identify whose "justifiable expectations" are referenced.

Hagen further observes that "[w]e have recognized that '[w]hen an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments.' " 510 U.S. at 420-21, 114 S.Ct. at 970 (quoting *Solem*, 465 U.S. at 471-472 n. 12, 104 S.Ct. at 1166-67 n. 12). Of course, the burdens on federal and tribal agencies of administering "jurisdiction dependent on the tract book" following a finding of diminishment—most recently typified by the issues pending in this proceeding—have also been acknowledged. *See, e.g., Solem*, 465 U.S. at 472 n. 12, 104 S.Ct. at 1167 n. 12 ("Conversely, problems of an imbalanced checkerboard jurisdiction arise if a largely Indian opened area is found to be outside Indian country. See *Seymour v. Superintendent*, 368 U.S., at 358[, 82 S.Ct., at 428]"); *DeCoteau v. District County Court*, 420 U.S. 425, 466-67, 95 S.Ct. 1082, 1103, 43 L.Ed.2d 300 (1975) (Douglas, J., dissenting).

[38] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586, 97 S.Ct. 1361, 1362, 51 L.Ed.2d 660 (1977) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930)).

[39] *See also* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV.L.REV. at 62 & n. 159 ("As statutes evolve, the text loses some of its focal power, and other

Indian Reservation is a Diminished Reservation? The New and Diluted Canons of Construction in Indian Law, 41 FED.B.NEWS & J. 544 (1994); Robert Laurence, *the Unseemly Nature of Reservation Diminishment by Judicial, as Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D.L. REV. 393 (1995).

Putting aside the metaphysics of interpretive canons, *Hagen*, particularly when read in tandem with *Perank*, leads to the conclusion that when speaking of "diminishment" under the 1902-1905 Acts, the Court was referring to the restoration of *all unallotted and unreserved lands* to the public domain. Consequently, it seems doubtful that a majority of the United States Supreme Court would adopt the narrower construction of the 1902 and 1905 Acts now urged by the Government and the Tribe, limiting the 1905 "diminishment" in the first instance to only those fee lands "actually settled" in the manner prescribed

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considerations become increasingly important in statutory interpretation—the purpose of the law, the surrounding legal terrain, and statutory precedents. The 1993 Term [of the Supreme Court] was replete with cases invoking these evolutive considerations." (footnotes omitted) (citing "Hagen v. Utah, [510 U.S. 399, 414-21,] 114 S.Ct. 958, 967-70[, 127 L.Ed.2d 252] (1994) (O'Connor, J.) (subsequent legislative signals and private interpretation); . . .").

Though largely taking *Hagen* and the *Hagen-Perank* criticism of *Ute Indian Tribe* at face value, Wendy L. Slater, *"Pulling up the Nails from the Uintah Indian Reservation Boundary*: Hagen v. Utah, 28 CREIGHTON L.REV. 529 (1995), criticizes *Hagen*'s use of current demographics: "In its reliance on a demographic profile of the Reservation ninety years after its opening, the Court weakened its position, tainting its otherwise credible and well-supported analysis. . . . The Court should not have weighed the merits of retaining the Reservation by examining modern circumstances, but instead should have considered only the practical consequences which reflected congressional intent at the time the Reservation was opened for settlement. In simple terms, the power to discontinue reservation status lies with Congress and not with the Court." *Id.* at 555-56 (footnotes omitted).

in the 1905 Act.[40] *See generally*, Robert Laurence, *supra;* Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB.LAND. L.REV. 1 (1995); James Grijalva, et al., *Diminishment of Indian Reservations: Legislative or Judicial Fiat?* (Panel Discussion), 71 N.D.L.REV. 415 (1995); Alex Tallchief Skibine, *Removing Race Sensitive Issue from the Political Forum or Using the Judiciary to Implicitly Take Someone's Country*, 20 J.CONTEMP.L. 1 (1994).

Hagen, though on its facts only deciding the "Indian country" status of Myton, Utah, effectively determined that the Uintah Reservation was diminished to the extent of the unallotted and unreserved lands that were opened to entry in 1905. To the extent that those lands were not later restored to tribal ownership and jurisdiction by sub-

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[40] Noting that Roosevelt City "was not settled under the townsite provisions of the 1905 Presidential Proclamation," the Tribe asserts that "[o]nly if it is determined that the City was settled on former homesteaded lands, a determination which cannot be made absent a title search, would the State have jurisdiction within Roosevelt City." Brief of Ute Indian Tribe at 22 n. 23. At the same time, the Tribe acknowledges that the status of Roosevelt was of some "concern to the Supreme Court in *Hagen*, *see* [510 U.S. at 420-21,] 114 S.Ct. at 970." *Id.* Under this court's reading of *Hagen*, the more pertinent question is whether Roosevelt City is found within the unallotted and unreserved lands "opened" to entry and settlement in 1905. If so, absent some subsequent legislative or administrative act returning all or part of its lands to the Reservation, Roosevelt City lies outside of "Indian country" under 18 U.S.C. § 1151(a).

In the "Brief of Defendant Roosevelt City in Support of Defendant's Motion to Vacate and Set-Aside Preliminary Injunction and to Dismiss Plaintiff's Motion for Permanent Injunctive Relief," filed July 26, 1994, counsel offers what may best be characterized as an informal, generalized proffer of evidence bearing upon land tenure in Roosevelt based upon unidentified land record documents showing Roosevelt to be built entirely on "opened" unallotted lands. *Id.* at 3. Beyond that, other than expressing Roosevelt City's obvious impatience with not having the immediate, unfettered power to do as it pleases, its Brief sheds little additional light on the legal issues now before the court in this proceeding.

sequent congressional administrative action, they ceased to have reservation status in 1905 and are no longer found within "Indian country" within the meaning of 18 U.S.C.A. § 1151 (1984).[41] To that extent, *Hagen* stands in direct conflict with the Tenth Circuit's *en banc* ruling in *Ute Indian Tribe*, which held that all lands within the original exterior boundary of the Uintah Reservation remain within "Indian country" under the statute. At the same time, the Uintah Reservation, as an entity, continued to exist after 1905 as to allotted and reserved lands not "opened" and as to lands later restored to the reservation by Congress or the Department of the Interior, the return of which "would enlarge the boundaries of the reservation." *Perank*, 858 P.2d at 950 (citing *Solem*, 465 U.S. at 467-468, 104 S.Ct. at 1164). Thus, "Notwithstanding the diminishment of the Uintah reservation in *Hagen*, there was no question but that the land within the diminished reservation retained its status as Indian country." *Chickasaw Nation v. State ex re. Oklahoma Tax Comm'n*, 31 F.3d at 976 n. 8.

Categories of Non-Trust Lands Now in Dispute

The three categories of non-trust, or fee lands identified in Paragraph 5.C of the Pre-trial Order involve tracts that either were never located within the area of "opened lands" diminishment under *Hagen* or are tracts of "opened lands" which at some point were returned to tribal owner-

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[41] As the Tenth Circuit recently noted, " '[F]ederal courts "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement." ' " *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540 n. 10 (10th Cir.1955) (quoting *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir.1993) (brackets in original), *cert. denied*, —— U.S. ——, 114 S.Ct. 2741, 129 L.Ed.2d 861 (1994) (quoting *McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991), *cert. denied*, 504 U.S. 910, 112 S.Ct. 1939, 118 L.Ed.2d 545 (1992))).

ship, trust, and/or reservation status by congressional or administrative action. *See* Pretrial Order at 5 & n. 1.

(a) Indian Allotments No Longer Held in Trust

Lands allotted to individual Indians that have passed into fee status after 1905" were never part of the "opened lands" and therefore were not affected by the restoration of unallotted lands to the public domain under the 1902 Act. Had Congress explicitly terminated the Uintah Reservation as a whole, leaving only individual Indian allotments, 18 U.S.C. § 1151(a) would not apply and the result may well be different, as it was in *DeCoteau* or *Yazzie*.[42] "Indian country" under § 1151(c) consists of individual Indian allotments, but only those allotments, "the Indian titles to which have not been extinguished." Were there no existing Uintah and Ouray Reservation as such, the State and Local Defendants' argument that trust status is determinative would be more persuasive. But

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[42] In their arguments, counsel for the State and Local Defendants refer to one passage from this court's initial memorandum opinion discussing the effect of the 1902 Act, considered by itself:

> Without much question, opening of the original terms of the 1902 Act would have accomplished the termination of the reservation; the unallotted lands were to be "restored to the public domain"—language precisely suited to disestablishment under *Seymour v. Superintendent* . . . and *Mattz v. Arnett*, ...

521 F.Supp. at 1122 (footnote & citations omitted). Had Congress spoken but once, and had *all* of the unallotted lands been "restored to the public domain" under the 1902 Act, this case would more closely resemble *DeCoteau*, where "the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs," and the reservation itself was terminated. 420 U.S. at 446, 95 S.Ct. at 1094. But as Justice Stewart took pains to point out in *Perank*, not all of the unallotted lands were so restored; the Uintah Reservation has always consisted of more than the mere "retention of allotments," starting with the 250,000-acres of grazing lands reserved for tribal use under the Joint Resolution of June 19, 1902 and the Acts of 1903 and 1905. 858 P.2d at 934 & n. 10. *See* "The Uintah Reservation: 'Diminished' or 'Terminated'?" *supra*.

where "all parties agree that the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use," (*Perank*, 858 P.2d at 934), § 1151,(a) still finds application and the more limited language of § 1151(c) does not control.

Application of §1151(a) to areas of the Reservation encompassing former Indian allotments also serves to lessen the burden on governmental and law enforcement agencies of determining "jurisdiction dependent on the tract book." *DeCoteau*, 420 U.S. at 466-67, 95 S.Ct. at 1103-04 (Douglas, J., dissenting). When located within a defined reservation boundary, jurisdiction remains constant even through trust status or ownership of a specific tract may change over time. *See Yazzie*, 909 F.2d at 1422 ("Although subsection 1151(a) clarifies that checkerboard *titles* within an existing reservation do not affect the status of an Indian reservation as reservation, subsections 1151(b) and (c) allow checkerboard *jurisdiction* outside reservation boundaries." (Emphasis in original; footnote omitted)). At the September 12, 1994 hearing, the court discussed this concept with counsel for the State of Utah:

> THE COURT: You tell me that you acknowledge, at this point, that the State of Utah has no jurisdiction over what you characterize as trust lands?
>
> Mr. ANDREWS: With very limited exceptions
>
> . . . .
>
> . . . .
>
> THE COURT: And you acknowledge, at least [as] to that area, the existence of a peripheral boundary of some kind?
>
> MR. ANDREWS: At this point there is a legal description as to what are trust lands and what are not.
>
> THE COURT: Now, just as a matter of curiosity, and this is strictly hyopthetical; say I am a tribal member with an allotment and I am right on the

> border. And . . . I convey out to a non-Tribe member. Do we thus, through private act, diminish the boundaries?
>
> MR. ANDREWS: I believe that the act of conveying out an interior portion—
>
> . . . .
>
> At this point, the state's position would be that in fact the conveyance out of some interior portion of some block would in fact be a reduction of the lands.
>
> THE COURT: A diminishment?
>
> MR. ANDREWS: In other words, it would not be Indian country.
>
> THE COURT: And without any legislative action on the part of anybody?
>
> MR. ANDREWS: That would be correct. I would point out that the issue of that circumstance has in fact been dealt with in the Yazzie case.

Transcript of Hearing, dated September 12, 1994, at 56:14-57:24.

Indeed, the *Yazzie* case was remanded "for consideration of whether some or all of P & M's South McKinley Mine is within Indian country under 18 U.S.C. §§ 1151(b) or (c)." 909 F.2d at 1422. On remand, it was determined that 48 Navajo trust allotments on 7,347 acres represent 47% of the surface area where the mine is located, with tribal and federal ownership representing 7% and 5% of the mine area, respectively. *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1534, 1542 (10th Cir.1995). The subsurface estate underlying the mine area is owned 52% by the United States and 47% by the successor in interest to the Santa Fe Pacific Railroad. *Id.* Rejecting Pittsburgh & Midway's argument that its coal mine is not located within "Indian country" under § 1151(c) "because neither the Navajo Nation nor any individual Navajo allottee holds title to any of the subsurface coal estate," the Tenth Circuit expressed strong disapproval of measuring jurisdiction according to changes in ownership:

> If we were to accept P & M's argument, jurisdiction would depend on commercial transactions between the United States, New Mexico, the Navajo Nation, and various private parties. *A particular parcel of land, or even an individual stick in the bundle of property rights, could suddenly change jurisdiction as a result of a single commercial transaction. This is an untenable prospect.* Such a result would unnecessarily complicate already convoluted jurisdictional questions throughout the West. *See generally* Paul W. Gates, *History of Public Land Law Development* (1968).
>
> We hold that the 48 trust allotments comprising 47% of the surface area of the South McKinley mine site are Indian country by definition under 18 U.S.C. § 1151(c). . . .

52 F.3d at 1542 (emphasis added). Even in an allotments-only setting governed by § 1151(c), altering the jurisdictional landscape by private conveyance is viewed with disfavor in this Circuit.

Recognizing that the Uintah Reservation continued to exist as a reservation after 1905, as was acknowledged in *Perank*, and that *Hagen* "redefined the Reservation boundaries resulting from our earlier decision" in *Ute Indian Tribe*, as most recently observed by the Tenth Circuit in *Cuch*, the Reservation continues to embrace those lands never "opened" as well as lands once opened but later "restored to tribal jurisdiction" (*Perank*), and thus embraced within its "limits" under 18 U.S.C. § 1151(a), regardless of transitory shifts in ownership.

More analogous to this case than *DeCoteau* or *Yazzie*, the diminishment of the Rosebud Reservation again proves instructive. In *Beardslee v. United States*, 541 F.2d 705 (8th Cir.1976), the defendant argued that the federal district court lacked jurisdiction over his offenses occurring "in a house on land then owned by non-Indians" located in Mission, South Dakota, within Todd Country

and the Rosebud Reservation. 'The original patent had been issued to an Indian allottee, but the Indian title was extinguished by conveyance to non-Indians in 1959." 541 F.2d at 706-707. Relying on *DeCoteau*, the defendant argued that the fee patented land in question was no longer "Indian country":

> The Indian conduct in *DeCoteau* did occur on non-Indian, unallotted land within the 1867 reservation boundaries. . . . However, the Supreme Court *also* concluded that as to this particular land, reservation status had been terminated by the Congressional Act of March 3, 1891, . . . Appellant cites no statute similarly disestablishing the reservation status of Todd County in the Rosebud Reservation.
>
> Ownership of the land alone by a non-Indian is not sufficient to change reservation status . . . .

Id. at 707 (emphasis in original; citations omitted). In the context of a *diminished* reservation, " 'Disestablishment thus is not effected by an allotment to an Indian or by conveyance of the Indian title to a non-Indian.' " *Id.* (quoting *Beardslee v. United States*, 387 F.2d 280, 286 (8th Cir.1967)).[43] Where the Reservation's "limits" persist, even though reduced or "redefined," § 1151(a) remains pertinent. Jurisdiction under § 1151(a) is allocated as a function of a defined, stable, and knowable *where* rather than merely a reflection of the vicissitudes of *who owns what* and *when*.

(b) Lands Distributed to Mixed-Blood Utes Under the Ute Partition Act

Tribally owned lands divided and distributed under the Ute Partition Act, Act of August 27, 1954, ch. 1009, 68

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[43] As noted above, nothing in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), or later cases disputes the *Beardslee* analysis affirming the continued reservation status of Todd County. *See* footnote 29 *supra*.

Stat. 868, *codified at* 25 U.S.C.A. §§ 677-677aa (1983), likewise do not appear to fall within the 1905 "opened lands" diminishment under *Hagen*. The State and Local Defendants contend that because "fee lands distributed to former tribal members under the Ute Partition Act" are "not 'within the limits' of a reservation, the exterior boundaries having been diminished, they do not fit within any subdivision of 18 U.S.C. § 1151, and cannot be considered 'Indian country' for jurisdictional purposes." Defendants' Memorandum at 22. Yet it appears those lands were considered "Indian country" *before* they were distributed under the Act, and as tribal lands held in trust, even the defendants would concede that point. These were not Indian allotments, "the Indian titles to which have not been extinguished" (§ 1151(c)); absent a finding of "dependent Indian community" status under § 1151(b), the lands must have fallen within § 1151(a) —lands which are in Indian country because they are "land *within the limits of any Indian reservation.*" 18 U.S.C.A. § 1151 (1984) (emphasis added).

For purposes of § 1151(a), "Indian tribal trust lands" are not a category of Indian country distinct from "land within the limits of any Indian reservation." In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), the Supreme Court expressly rejected a state-asserted distinction between "tribal trust land" and "reservation" status:

> Oklahoma argues that the tribal convenience store should be held subject to state tax laws because it does not operate on a formally designated "reservation," but on land held in trust for the Potawatomis. Neither *Mescalero* [*Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)] nor any other precedent of this Court has ever drawn the distinction between tribal trust lands and reservations that Oklahoma urges. In *United States v. John*, 437 U.S. 634[, 98 S.Ct. 2541, 57 L.Ed.2d 489] (1978),

> we stated that the test for determining whether land is Indian country does not turn on whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been " 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' " *Id.* at 648-649, [98 S.Ct. at 2548-49]; see also *United States v. McGowan*, 302 U.S. 535, 539[, 58 S.Ct. 286, 288, 82 L.Ed. 410] (1938).
>
> . . . Here, . . . the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in *John, we find that this trust land is "validly set apart" and thus qualifies as a reservation* for tribal immunity purposes. 437 U.S. at 649[, 98 S.Ct. at 2549].

498 U.S. at 511, 111 S.Ct. at 910 (emphasis added). The Court reiterated this point in *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993):

> The Commission . . . contends that the relevant boundary for taxing jurisdiction is the perimeter of a formal reservation, not merely land set aside for a tribe or its members. . . . Here, . . . some of the Tribe's members may not live within a reservation; indeed, if the Commission's interpretation of the 1891 Treaty is correct and the Reservation was disestablished, none do.
>
> . . . We noted [in *Potawatomi*] that we have never drawn in the distinction Oklahoma urged. Instead, we ask only whether the land is Indian country. . . . Accord, F. Cohen, Handbook of Federal Indian Law 34 (1982 ed.) ("[T]he intent of Congress, as elucidated by [Supreme Court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments."); *Ahboah v. Housing Authority*

> *of Kiowa Tribe of Indians,* 660 P.2d 625, 629 (Okla.1983) (same).
>
> . . . .
>
> Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities. . . .

508 U.S. at 124-25, 128, 113 S.Ct. at 1991-92, 1993.

As Justice Marshall noted in *Solem,* "Congress uncouple[d] reservation status from Indian ownership, and statutorily define[d] Indian country to include lands held in fee by non-Indians within reservation boundaries" in § 1151(a). *Solem,* 465 U.S. at 468, 104 S.Ct. at 1164. On this point, the State and Local Defendants' " 'Indian country'-equals-trust lands" equation collides with the express language of the statute. In arguing that "after diminishment, when lands *leave* trust status, they no longer fit within any category of 18 U.S.C. § 1151, and so are no longer Indian Country," (Defendants' Memorandum at 20), the defendants seek to *recouple* reservation status and tribal trust status—in effect writing the "Notwithstanding issuance of any patent" language entirely out of § 1151(a).

All of the case law cited in support of the defendants' "trust lands only" theory of Indian country concerns the status of Indian allotments remaining in disestablished areas of a reservation. *See United States v. Pelican,* 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914) (allotted lands remain "validly set apart for the use of the Indians" where they were excepted from restoration of portion of reservation to the A.O. public domain); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 615-616 n. 48, 97 S.Ct. 1361, 1377-78 n. 48, 51 L.Ed.2d 660 (1977) (Indian allotments outside diminished reservation remain "Indian country"); *DeCoteau v. District County*

Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) (reservation terminated; only Indian allotments remain); *Pittsburgh & Midway Coal Mining Co. v. Yazzie,* 909 F.2d 1387 (10th Cir.1990) (same). They cite no case holding that "Indian tribal trust lands" no longer fall within § 1151(a) when they "leave trust status," presumably through issuance of a patent.

At one time, "Indian country" status was held to be dependent upon Indian title, and that land ceased to be Indian country "[as] soon as they parted with the title . . . without any further act of Congress, . . ." *Bates v. Clark,* 95 U.S. 204, 208, 24 L.Ed. 471 (1877). *See United States v. Celestine,* 215 U.S. 278, 285, 30 S.Ct. 93, 94, 54 L.Ed. 195 (1909) (Indian country and reservation status not synonymous). Congress deliberately abandoned the title-dependent definition of Indian country by enacting 18 U.S.C. § 1151(a) in 1948. *See* FELIX S. COHEN FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 29-38 (Rennard Strickland, ed. 1982). This court has found no authority suggesting that the title-dependent *Bates v. Clark* definition of "Indian country" persists as a rule of federal law despite the enactment of § 1151(a). *See also Ute Indian Tribe,* 521 F.Supp. at 1081-1084.

"Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. *See* 18 U.S.C. § 1151." *Sac and Fox,* 508 U.S. at 123, 113 S.Ct. at 1990. Once land has been " 'validly set apart for the use of the Indians as such, under the superintendence of the Government,' "[44] it becomes "land within the limits of any Indian reservation" under § 1151(a). Having once been "validly set apart" as Reservation land, "all tracts included within it remain a part of the reservation until separated therefrom

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[44] *United States v. John,* 437 U.S. 634, 649, 98 S.Ct. 2541, 2549, 57 L.Ed.2d 489 (1978) (quoting *United States v. Pelican,* 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914)).

by Congress." *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 94, 54 L.Ed. 195 (1909); *accord, Indian Country, U.S.A.*, 829 F.2d at 973-976. As noted above, land within such limits remains Indian country "notwithstanding the issuance of any patent," *i.e.*, any change in title or ownership. 18 U.S.C. § 1151(a). The same would appear to be true of tribal lands distributed in fee to individual Mixed-Blood Utes under the Ute Partition Act.

It therefore seems that the more pertinent question in this case is whether the Ute Partition Act worked its own separate diminishment of the Reservation as to those lands conveyed to the Mixed-Blood Utes. The Tribe represents that approximately 211,430 acres of tribal land were distributed to the Mixed-Blood Utes pursuant to the Ute Partition Act, and that since 1954, the Tribe has reacquired and placed into trust status approximately 179,000 acres of lands distributed under the Act. Brief of Ute Indian Tribe at 16 & n. 21. As to the latter acreage, of course, it remains uncontroverted that it comprises part of the Reservation and is located within "Indian country" under 18 U.S.C. § 1151. Thus, based upon the Tribe's figures, approximately 32,430 acres of land distributed under the Ute Partition Act remain in non-frust, or fee status.[45]

In *Hackford v. Babbit*, 14 F.3d 1457 (10th Cir.1994), the Tenth Circuit dealt with continuing Indian water rights appurtenant to lands distributed under the Ute Partition Act and currently owned by a Mixed-Blood Ute individual. Plaintiff Calvin C. Hackford, a terminated Mixed-Blood Ute belonging to the Uintah Band, "owns seven parcels

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[45] In the Memorandum from the Regional Solicitor, U.S. Dept. of the Interior to the Superintendent, Uintah and Ouray Agency, dated July 7, 1994, at 11-12, the Government reports that 26,763.34 acres were sold into fee status pursuant to 25 U.S.C.A. § 677h, and indicates that under 25 U.S.C.A. § 677*l*, fee patents were issued for 2,733.569 acres of former allotments, 29,030,969 acres of tribal agricultural lands, and 16,190.61 acres of grazing lands.

of land *within the Uintah and Ouray Indian Reservation* in Utah." 14 F.3d at 1459 (emphasis added).[46] Some of those parcels are served by the Uintah Irrigation Project, which is managed by the United States Department of the Interior. *Id.* The Tenth Circuit held that under the provisions of the Ute Partition Act, Hackford retained water rights sharing the same priority date as water rights appurtenant to other reservation lands, *viz,* no later than the creation of the reservation in 1861, consistent with *Winters v. United States,* 207 U.S. 564, 577, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908). *Id.* at 1467-69.

The court has reviewed the Ute Partition Act and finds nothing dealing with the question of reservation boundaries, at least in express terms. However, the Act does contain language that bears upon some jurisdictional questions: Section 16 of the Act, 25 U.S.C.A. § 677*o*, provides that "[w]hen any mixed-blood member of the tribe has received his distributive share of the tribal assets distributed to the mixed-blood group under the provisions of section 677i," the Secretary of the Interior "is authorized and directed to immediately transfer to him unrestricted control of all other property held in trust for such mixed-blood member by the United States," as well as "remov[ing] all restrictions on the sale or encumbrance of trust or restricted property owned by such member of the tribe, and Federal supervision of such member and his property shall thereby be terminated," with the exception of any interest in unadjudicated or unliquidated tribal claims, rights or assets which remain in trust under the Act. *See generally* 25 C.F.R. § 217.1 *et seq.* (1995).

[46] However, *Hackford* was decided on January 21, 1994, approximately one month *before* the United States Supreme Court announced its decision in the *Hagen* case. While *Hagen* likely will have no practical impact on the management of Ute water rights under the Ute Partition Act, the language of the *Hackford* opinion quoted above cannot strictly be viewed as controlling on the question whether lands distributed to the Mixed-Blood Utes remain within Reservation boundaries following *Hagen.*

Section 17 of the Act, 25 U.S.C.A. § 677p, provides that "[a]fter seven years from August 27, 1954, all property distributed to the mixed-blood members of the tribe . . . and all income derived therefrom . . . shall be subject to the same taxes, State and Federal, as in the case of non-Indians; . . .," excepting income of corporations organized to jointly manage unliquidated and undistributed tribal assets. Section 18 of the Act, 25 U.S.C.A. § 677q, similarly provides that after federal supervision of Mixed-Blood Ute property is terminated, "the laws [with respect to the probate of wills, determination in heirship, and the administration of estates] of the several States, Territories, possessions and the District of Columbia within which such mixed-blood members reside at the time of their death shall apply." Section 23 of the Act, 25 U.S.C. § 677v, provides that following removal of trust restrictions on the property of Mixed-Blood Ute members, "All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated. and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction."

The jurisdictional provisions of the Ute Partition Act operate to render those tribal members over whom federal supervision was terminated virtually indistinguishable from their non-Indian neighbors. The individual property of the Mixed-Blood Utes, together with land distributed to them under the Act, was removed from trust status and federal supervision, and in essence, conveyed to them in fee. With few qualifications, their lands became subject to taxation, probate administration, and alienation under State law just as if they were fee lands owned by non-Indians. Individual Mixed-Blood Utes became subject to state laws "in the same manner as they apply to other citizens within their jurisdiction," *i.e.*, as though the Mixed-Blood Utes were non-Indians.

Yet the effects of the Ute Partition Act, though drastic, were not absolute. For example, Section 21 of the Act, 25 U.S.C.A. § 677t, expressly states that "[n]othing in this subchapter shall abrogate any water rights of the tribe or its members." As explained in *Hackford*, "water rights were treated as appurtenant to the lands that were divided between the groups" under the Act; irrigable lands such as those owned by Mr. Hackford retained a right of user to water reserved for the Ute Indian Tribe under the *Winters* doctrine when the Reservation was created in 1861. 14 F.3d at 1463, 1468-69. Although "the individuals with irrigable land may have a right of user to the water," *Hackford* points out that "the water right itself is a tribal right." 14 F.3d at 1468.

> When the United States set aside and reserved land for the Indians, it also impliedly reserved sufficient water to accomplish the purposes for which the reservation was established. *Winters*, 207 U.S. at 577, 28 S.Ct. at 212. . . . When the reservation land was allotted, and the Project developed, the allottees acquired the right to use a portion of the tribe's reserved water right with a priority date no later than the creation of the reservation. *United States v. Powers*, 305 U.S. 527, 532-33, 59 S.Ct. 344, 346, 83 L.Ed. 330 (1939). Therefore, Hackford's right of user, whether derived from the Uintah Band or the Ute tribe, has the same priority date as that delivered through the Project to allotted lands.

14 F.3d at 1469. *Hackford* further concluded that "[u]nder the Partition Act the Secretary's authority to manage the [Uintah Indian Irrigation] Project and assess charges was unaffected." *Id.* at 1468. "Likewise the Partition Act did not change the trust relationship set up by the 1906 Act." *Id.* *Hackford* holds that for purposes of management of the Uintah Indian Irrigation Project and the Ute tribal reserved water rights upon which it is based, the non-trust lands of a Mixed-Blood Ute distributee

under the Ute Partition Act are treated in a manner indistinguishable from Indian trust lands served by the Project. A finding that the lands distributed to Mixed-Blood Utes under the Act remain apart of the Uintah Reservation seems wholly consistent with the continuing use of the Tribe's reserved water rights pursuant to *Winters* and its progeny to irrigate the distributed lands.

Similarly, this court previously held that the Ute Partition Act did not divest individual Mixed-Blood Utes of their personal rights of user in hunting and fishing rights belonging to the Ute Indian Tribe, or limit the exercise of those rights to the lands distributed to Mixed-Blood Utes under that Act. *United States v. Felter,* 546 F.Supp. 1002 (D.Utah 1982), *affirmed,* 752 F.2d 1505 (10th Cir. 1985). *Felter* holds that the tribal hunting and fishing rights represent another example of "other assets not susceptible to equitable and practical distribution," 25 U.S.C. § 677i, which remain in trust under joint management of the Tribe and the Mixed-Blood Utes, and makes no distinction between lands distributed to the Mixed-Blood Utes and lands retained in tribal ownership.

Citing to *Felter* and to § 23 of the Ute Partition Act, 25 U.S.C. § 677v, the State and Local Defendants argue that "[t]here is another compelling reason for not considering former UPA lands as 'Indian Country' for jurisdictional purposes. . . . § 23 of the UPA provided that . . . all statutes affecting Indians because of their status as Indians would no longer be applicable to mixed-bloods, and State and Local Defendants' Memorandum at 22 n. 16. "In short," defendants assert, "state law applies to mixed-bloods and their lands as with any other citizen of the State." *Id.*[47] Rejecting a similar argument that § 6

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[47] Of course, *Felter* holds otherwise as to Indian hunting and fishing rights. *See* 546 F.Supp. at 1024 (Mixed-Blood Utes' right of user in tribal hunting and fishing rights "would remain subject to *tribal* regulation, whether on or off tribally or Indian owned

of the General Allotment Act, which provided that upon issuance of patents in fee to Indian allottees, "each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . .,"[48] extended state jurisdiction over fee-patented allotments, the Supreme Court in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), observed:

> If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size. . . .
>
> . . . The State has referred us to no decisional authority and we know of none—giving the meaning for which it contends to § 6 of the Allotment Act in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands—statutes discussed, for example, in *McClanahan*, 411 U.S., at 173-79[, 93 S.Ct., at 1262-66]. . . . Congress by its more modern legislation has evinced a clear intent to eschew any such "checkerboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.

425 U.S. at 478, 479, 96 S.Ct. at 1643, 1644 (emphasis in original). Arguably, the distribution of tribal lands in fee to Mixed-Blood Ute distributee under the Ute Parti-

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lands. It would be subject at most to minimal state regulations. *See Kimball v. Callahan*, 590 F.2d [768], at 776-777 [(9th Cir. 1979), *cert. denied*, 444 U.S. 826[, 100 S.Ct. 49, 62 L.Ed.2d 33]]" (Emphasis in original.)). *Accord, Menominee Tribe of Indians v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

[48] Act of February 8, 1887, ch. 119, § 6, 24 Stat. 390, *codified as amended* at 25 U.S.C.A. § 349 (1983).

tion Act by itself can reduce the size of the Uintah Reservation "for *all* jurisdictional purposes" no more than § 6 of the General Allotment Act diminished the Flathead Reservation in *Moe*.

Conceding that § 23 of the Act is "not controlling on the issue of what lands fall within § 1151," the State and Local Defendants suggest that "the pattern of UPA lands to tribal jurisdiction cuts against the purposes of the UPA, and would be likely to engender additional disputes between the Tribe and the mixed-blood former members." Defendants' Memorandum at 22 n. 16. Remembering that under the Ute Partition Act "the mixed blood former members" became jurisdictionally indistinguishable from non-Indians in almost all respects, the same is true whether they are found within or outside of "Indian country" under § 1151(a). Blanket application of state law to the Mixed-Blood Utes is not so much a statement that they no longer reside within "Indian country" [49] as it is a statement that the Mixed-Blood Utes are no longer deemed to be "Indians" for purposes of federal law, including 18 U.S.C. §§ 1151 *et seq*. Except as to those matters which are retained in trust status or under federal, tribal, or joint tribal/mixed-blood management under the Act (*e.g.*, oil, gas, water, hunting and fishing rights, etc.), the Tribe could assert on greater jurisdiction over Mixed-Blood Ute individuals than it can over non-Indians located on fee lands within "Indian country," a result which hardly

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[49] Following the enactment by Congress of the Ute Partition Act, Preston Allen, a Mixed-Blood Ute "residing on the Uintah Indian Reservation in Duchesne County, Utah," was denied the right to vote by Porter Merrell, Duchesne County Clerk, in a state-supervised election—a denial prompted by state statute and rationalized by the Utah Supreme Court based upon Allen's continued residence on *an existing Indian reservation. Allen v. Merrell*, 6 Utah 2d 32, 305 P.2d 490, 492-495 (1956), *vacated and remanded as moot*, 353 U.S. 932, 77 S.Ct. 809, 1 L.Ed.2d 756 (1957).

As to this issue, the State of Utah does not write on the cleanest of slates.

"cuts against the purposes of the UPA." Given that the Ute Partition Act expressly contemplates a continuing relationship between the Tribe and its former members as to undivided assets, the defendants' argument founders.

Adapting the "fairly clean analytical structure" established by the Supreme Court in *Hagen* and *Solem*, as well as the earlier decisions examined in detail in this court's initial memorandum opinion (*see* 521 F.Supp. at 1085-1092), to the language, history, and circumstances surrounding the Ute Partition Act, this court finds nothing clearly evidencing a congressional intent to alter or further diminish the boundaries of the Uintah Reservation by distributing tribally-owned lands to the Mixed-Blood Utes, or "events surrounding the [Act's] passage . . . [which] unequivocally reveal a widely held, contemporaneous understanding" that such was Congress' purpose. *Solem*, 465 U.S. at 471, 104 S.Ct. at 1166. *Cf. Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 464 (9th Cir.1996) (partition of tribal lands under Navajo-Hopi Land Settlement Act of 1974 not a reservation "diminishment"; Act divided Navajo-Hopi joint use area into two separate reservations). During the short-lived "termination era," Congress' attention was largely focused on other questions.[50] The "Indian country" status of the distributed

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[50] In 1953, Congress had created a wholly separate mechanism to extend state jurisdiction over Indian reservations, Public Law 83-280. *See* Act of August 15, 1953, ch. 505, 67 Stat. 588; FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 175-77 (Rennard Strickland ed. 1982). If anything, Congress in 1954 was contemplating much more sweeping goals—the ultimate termination of entire tribes as well as their reservations—in order to bring an end to the perceived evils of federal supervision, and thus would have given little or no thought to adjustment of reservation boundaires during the interim. *See generally*, H.R.Con.Res. 108 83d Cong., 1st Sess., 67 Stat. B132 (1953); FELIX S. COHEN'S HANDBOOK OF FEDERAL LAW 170-75; DONALD L. PARMAN, INDIANS AND THE AMERICAN WEST IN THE TWENTIETH CENTURY 135-142 (1994); Charles Wilkinson & Eric Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L.REV. 139 (1977).

lands thus did not change either upon distribution or upon the later reacquisition of many of the parcels by the Tribe; these lands remained within the "limits" of the Reservation under § 1151(a) at all pertinent times.

(c) Lands Exchanged into Non-Trust or Fee Status

The third category of non-trust, or fee lands identified in Paragraph 5.C of the Pretrial Order is "lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status by the Tribe for then-fee (now trust) lands in an effort to consolidate its land holdings." Like the individual Indian allotments discussed above, the lands embraced by this latter category (at least as it is defined) were never part of the "opened lands" restored to the public domain under the 1902 Act.

Had Congress explicitly terminated the Uintah Reservation as a whole, 18 U.S.C. § 1151(a) would not apply and the result as to these "exchanged" fee lands may well be different. As with the Indian allotments, were there no existing Uintah and Ouray Reservation as such, the State and Local Defendants' argument that trust status is determinative might prevail. But where "all parties agree that the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use," (*Perank*, 858 P.2d at 934), § 1151(a) still finds application.

The Indian Land Consolidation Act, Pub.L. No. 97-459, title II, 96 Stat. 2517 (1983), *codified* at 25 U.S.C.A. §§ 2201-2211 (Supp. 1995), appears primarily directed to exchanges of Indian tribal lands for individual Indian trust lands (*e.g.*, allotments) in an effort to consolidate tribal land holdings. *See* 25 U.S.C.A. § 2203(a). 25 U.S.C.A. § 2204 states that "[a]ny Indian tribe may purchase at no less than the fair market value part or all of the interests in any tract of trust or restricted land *within that*

tribe's reservation or otherwise subject to that tribe's jurisdiction with the consent of the owners. . . ." (Emphasis added.) The Act also includes provisions permitting restrictions on dissipation of individual Indian trust holdings through inheritance by non-Indians. *See* 25 U.S.C.A. §§ 2205-2206. The Indian Land Consolidation Act represents a House-conceived expansion of a Senate bill designed both to permit the consolidation of checkerboarded tribal landholdings within the opened Devil's Lake Sioux Reservation in North Dakota and to "reduce instances of fractionated heirship in trust lands and provide land for tribal programs designed to improve the economy of the tribe and its members. . . ." H.Rep. No. 97-908, 97th Cong., 2d Sess. 5 (reprinted in 1982 *U.S. Code Cong. & Admin. News* 4415, 4416).[51] The House amendment incorporated language of H.R. 5856, "an omnibus bill which makes provisions almost identical to [the Senate bill] applicable to all tribes." *Id.* at 9 (reprinted in 1982 *U.S.Code Cong. & Admin.News* at 4419). As the House Committee Report explains:

> Many Indian tribes do not own all their lands in a single tract but have their tribal lands spread out in many tracts over a large geographical area where tracts of land are owned by the tribe, by individual Indians who hold their lands in trust or restricted fee and by non-Indians holding their lands in fee. This "checkerboard" pattern of land ownership makes it very hard for tribes to develop and adopt comprehensive and constructive land use plans. The amend-

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[51] S. 503, the original Senate version of the Indian Lands Consolidation Act, concerned the Devil's Lake Sioux Reservation, a reservation where the unallotted lands were "opened" to non-Indian entry without diminishment or termination of the reservation's boundary. *See, e.g., United States v. Grey Bear*, 636 F.Supp. 1551 (D.N.D.1986), *affirmed in part, reversed in part on other grounds*, 828 F.2d 1286 (8th Cir.1987), *district court affirmed on en banc rehearing re: misjoinder issue*, 863 F.2d 572 (8th Cir.1988).

> ment provides certain mechanisms by which the tribes will be able to consolidate their tribal landholdings by allowing the Secretary of the Interior to acquire certain lands for the tribes and allowing tribes to exchange and sell certain tribal lands.

Id. at 10 (reprinted in 1982 *U.S. Code Cong & Admin. News* at 4419). Thus, the Act is directed more toward consolidation and expansion of tribally owned lands for purposes of land use planning and economic development than the redrawing of jurisdictional boundaries.

As with Indian allotments, where such land exchanges take place within the existing boundaries of a reservation, the transition of a particular parcel into or out of tribal ownership or trust status has no impact on the existing jurisdictional limits. Under the Defendants' "trust-lands-only" analysis of "Indian country," the jurisdictional landscape would be altered each time an exchanged parcel changes trust status, further complicating any tribal land consolidation program.

As to each of the three categories of non-trust, or fee lands identified in Paragraph C of the Pretrial Order, *Hagen* and *Ute Indian Tribe* are not locked in irreconcilable conflict. Under both rulings, these lands remain within the "limits" of the Reservation for purposes of 18 U.S.C. § 1151(a) and are found within "Indian country" regardless of their particular ownership status, at least so long as they are not found among the unallotted and unreserved lands "opened" in 1905 and never subsequently restored to the Reservation by legislative or administrative act. It is only as to the latter category, the "opened" lands never restored to the Reservation, that *Hagen* and *Ute Indian Tribe* diverge.

As an attachment to the United States' Memorandum as *amicus curiae*, the Government submitted a preliminary draft "Uintah and Ouray Reservation Ownership Status Map" illustrating the land tenure and current status of

various tracts located within the original Uintah Reservation boundaries. The exhibit uses contrasting colors to differentiate the various categories of land discussed above, based upon the Government's on-going compilation of land tenure data. *Orange*, for example, indicates current Ute tribal trust lands, while *medium blue* and *light blue* identify "opened" lands which were the subject of homestead or "cash entry," respectively. The disputed categories of non-trust, non-opened lands just discussed (former Indian allotments, etc.), together with existing Indian trust allotments, are aggregated within the map's *purple* regions.

Counsel has made it very clear that the exhibit does not represent the final word as to the land tenure of each tract depicted. Nonetheless, the exhibit does offer a fair approximation of what a tract map reflecting the effects of the 1902-1905 Acts as read in *Hagen* would look like, as modified to account for those lands subsequently restored to the Reservation by congressional or administrative action. Treated as an illustrative rather than a definitive work, the exhibit offers helpful guidance in identifying those lands within the original boundaries of the Uintah Reservation which are affected by the Supreme Court's *Hagen* decision.

Ute Indian Tribe, Hagen and the Finality of Litigation

Having defined the point of divergence between *Hagen* and *Ute Indian Tribe*, the court turns to the next question presented: *which* ruling governs as to the parties to this action? Each party argues the merits—and asserts the obviousness—of its preferred answer to that query. Paragraphs 5.A and 5.B of the Pretrial Order frame the question of which ruling governs in these terms:

> A. In spite of *Hagen*, are the State and Local Defendants precluded as a matter of law or equity under the doctrine of collateral estoppel or otherwise, from asserting jurisdiction over the Tribe or its

members within the exterior boundaries of the Uintah and Ouray Reservation, as those boundaries were defined in *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir.1985), *cert. den.* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986)?

B. Although the U.S. Supreme Court denied the Tribe leave to intervene as a party in *Hagen*, is the Supreme Court's decision binding on the Tribe and its members in this action under the doctrine of *stare decisis* or otherwise?

Both of these questions raise important policy concerns involving the finality of a court's judgment in a litigated dispute and the need for uniformity of federal law throughout our judicial system as well as the supervisory power of both the Supreme Court and the courts of appeals.

(a) *Ute Indian Tribe*, Res Judicata and Collateral Estoppel

Relying upon the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), in seeking further injunctive relief in this proceeding, the Ute Indian Tribe asserts collateral estoppel to be the controlling principle. The Tribe contends that as a party to this litigation, "the State was precluded from relitigating the issue resolved in *Ute Indian Tribe*, including whether Congress intended to diminish the Uintah Valley Reservation when it was opened to non-Indian settlement in 1905, against the Tribe or anyone in privity with the Tribe," (Brief of Ute Indian Tribe at 8), citing *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). In *Montana*, the Supreme Court explained the role of the doctrines of res judicata and collateral estoppel in the judicial process and the important policies underlying both:

A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined

> by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . ." *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48-49[, 18 S.Ct. 18, 27, 42 L.Ed. 355] (1897).

440 U.S. at 153, 99 S.Ct. at 973. Under *res judicata,* "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. . . ." *Id.* (citations omitted). Under *collateral estoppel,* "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. . . ." *Id.* (citations omitted).

> Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. *Southern Pacific R. Co., supra,* at 49[, 18 S.Ct. at 27]; *Hart Steel Co. v. Railroad Supply Co.,* 244 U.S. 294, 299[, 37 S.Ct. 506, 507, 61 L.Ed. 1148] (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

440 U.S. at 153-54, 99 S.Ct. at 973-74 (footnote omitted).

The State and Local Defendants respond that "[c]ollateral estoppel is a discretionary doctrine that has no application where there has been an intervening change in legal principles," (Defendants' Memorandum at 10), and that "[i]n light of the intervening substantive changes of law since *Ute Indian Tribe,* that decision's validity for collateral estoppel purposes is questionable at best." *Id.* at 23-24 (citing *Brock v. Williams Enterprises of Georgia,*

832 F.2d 567, 574 (11th Cir.1987), and *Kania v. Fordham*, 702 F.2d 475, 476 n. 2 (4th Cir.1983)). "The State and Local Defendants are therefore not bound by the Tenth Circuit's decision in *Ute Indian Tribe* where the logic of that decision has been undermined by *Hagen*." (*Id.* at 10 (footnote omitted)).

Both the Utah Supreme Court in *Perank* and the United States Supreme Court in *Hagen* formally sidestepped the question of the collateral estoppel effect of the Tenth Circuit's *Ute Indian Tribe* decision, relying largely upon notions of waiver. In *Perank*, the court hastened to point out that "neither Perank, the Department of Justice, nor the Tribe suggests that the Tenth Circuit's *en banc* decision in *Ute Indian Tribe* has res judicata effect in this case." 858 P.2d at 931 (footnote omitted). In its brief as *amicus*, the Tribe discussed only defendant Perank's status as an Indian; it was silent on the collateral estoppel question. For its part, the United States simply submitted a copy of the brief it had filed in opposition to the certiorari petition in *Ute Indian Tribe* six years earlier.

In *State of Utah v. Hagen*, [52] however, the Utah Court of Appeals had expressly relied on collateral estoppel in finding *Ute Indian Tribe* controlling on the boundary issue. Nevertheless, the Utah Supreme Court reversed, citing Perank, without further discussion of collateral estoppel.[53]

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[52] 802 P.2d 745 (Utah Ct.App.1990) ("While we have not been acquainted with the precise arguments advanced by the state in *Perank*, we are hard-pressed to see how, given the Supremacy clause and the doctrine of collateral estoppel, our state courts could reach a contrary decision that would have any practical effect."), *reversed*, 858 P.2d 925 (Utah 1992).

[53] In footnote 3 of the *Perank* opinion, Justice Stewart essayed further concerning the collateral estoppel issue which *Perank* did not decide:

> Even if the defense had been raised in this case, its application against the State of Utah would be problematic. Although we have held that collateral estoppel does not require mutuality of parties when it is raised defensively against private litigants, . . . we have not decided whether the doctrine of nonmutual

The United States Supreme Court also declined to address the collateral estoppel effect of *Ute Indian Tribe* in *Hagen* on procedural grounds: because counsel initially representing petitioner Hagen had "disavowed the collateral estoppel argument at the petition stage," the Court saw "no reason to consider an argument that petitioner

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collateral estoppel applies against the State. Federal law generally requires full mutuality of parties when collateral estoppel is applied against the government. *See United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984); *see also United States v. Stauffer Chemical Co.*, 464 U.S. 165, 169, 104 S.Ct. 575, 577, 78 L.Ed.2d 388 (1984); *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Montana v. United States*, 440 U.S. 147, 155-62, 99 S.Ct. 970, 974-78, 59 L.Ed.2d 210 (1979); *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed.2d 898 (1948). Nonmutual collateral estoppel does not apply against the government because of overriding policy considerations. *Mendoza*, 464 U.S. at 163-64, 104 S.Ct. at 574. The rule requiring full mutuality of parties has also been required with respect to estopping state governments. *See Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558, 1577-82 (11th Cir. 1985). *See generally* Restatement (Second) of Judgments § 28 (1982); 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4425 (1981 & Supp. 1992). As the Utah cases cited in footnote 2 indicate, the issue of reservation diminishment can arise in a number of civil contexts in which the State of Utah is not a party, and rather than delay a decision on an issue of such substantial public importance that will inevitably recur, we think it appropriate to address the diminishment question, even if res judicata were otherwise applicable against the State.

858 P.2d at 931 n. 3 (citations omitted). In its Respondent's Brief submitted to the United States Supreme Court in *Hagen*, the State of Utah pointed to footnote 3 of *Perank* and argued that "[a]s applied to Perank, this discusion by the Utah Supreme Court is probably dictum. However, as applied to Hagen this language *is a direct and clear ruling*. The Utah Supreme Court determined it would not apply the doctrine of collateral estoppel to bar litigation of the Reservation diminishment issue for reasons of public policy . . .," and that this ruling "applies equally to Hagen." Brief of Respondent, at 47, 1993 WL 384805 (emphasis added). That is one reading of footnote 3. . . .

not only failed to raise but on which he expressly refused to rely in seeking a writ of certiorari, . . ." *Hagen*, 510 U.S. at 410, 114 S.Ct. at 965.[54]

The Tribe recounts that after certiorari had been granted in *State of Utah v. Hagen*, it filed a motion to intervene as a petitioner in the proceedings before the United States Supreme Court. The motion received a luke-

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[54] In *Hagen*, Justice O'Connor suggested that "[p]etitioner's only recourse would have been to attack the judgment in *Perank* on the ground that the Utah Supreme Court failed to give effect sua sponte to the prior determination in *Ute Indian Tribe* that the reservation had not been diminished." *Hagen*, 510 U.S. at 409, 114 S.Ct. at 964. Yet Hagen was not petitioning for review of the judgment in *Perank*. Rather, Hagen had *prevailed* before the Utah Court of Appeals on grounds including collateral estoppel:

> The federal courts, construing federal statutes, federal regulations, and federal Indian policy, have determined that Myton is within the confines of the reservation. *See Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir.1985) (en banc), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). . . . The Tenth Circuit's decision does not appear to hold open any role for the state courts in refining its holding in *Ute Indian Tribe*. While we have not been acquainted with the precise arguments advanced by the state in *Perank*, we are hard-pressed to see how, given the Supremacy clause and *the doctrine of collateral estoppel*, our state courts could reach a contrary decision that would have any practical effect.

State of Utah v. Hagen, 802 P.2d 745, 747 (Utah Ct.App.1990), *reversed*, 858 P.2d 925 (Utah 1992). Pushing the collateral estoppel issue aside, the Utah Supreme Court summarily reversed the court of appeals' holding in *Hagen* "that a 1985 Tenth Circuit decision had conclusively determined that Myton was in Indian country," concluding instead that "the court of appeals erred in treating Myton as Indian country" in light of *Perank*, which "establishes that for purposes of criminal jurisdiction, Myton, Utah, is not in Indian country." *Hagen*, 858 P.2d at 925-26. Unlike *Perank*, it seems fairly apparent that the question of the collateral estoppel effect of *Ute Indian Tribe* had been raised and ruled on in *Hagen*. Notwithstanding extensive briefing of the collateral estoppel issue by Hagen's successor counsel before the United States Supreme Court, the Court declined to consider the question. *See* Brief of Petitioner, 1993 WL 409365, at 1-9.

warm response from the State of Utah and ultimately was denied by the Court, relegating the Tribe once again to the role of an *amicus*. The Tribe now argues that as an *amicus*, it was not bound by the Court's ruling in *Hagen*, citing *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989), *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 & n. 17, 99 S.Ct. 645, 652 & n. 17, 58 L.Ed.2d 552 (1979), and *Kerr-McGee Chemical Corp. v. Hartigan*, 816 F.2d 1177 (7th Cir.1987). According to the Tribe, "[t]he Supreme Court has ruled that a sovereign is not bound by a decision purporting to resolve a boundary dispute affecting that sovereign, when the sovereign was not a party to the proceedings," citing *Georgia v. South Carolina*, 497 U.S. 376, 110 S.Ct. 2903, 111 L.Ed.2d 309 (1990). Brief of Ute Indian Tribe at 11-12. Conversely, we may suppose, a sovereign *is* bound by a decision where that sovereign is a party to the proceedings.

The Tribe suggests that the consequences of the *Hagen* case, when considered in light of its procedural posture, are three-fold: (1) the Ute Indian Tribe is not directly bound by the United States Supreme Court's judgment in *Hagen* because the Tribe was never joined as a party to that proceeding; (2) the State of Utah is directly bound by the Tenth Circuit's *en banc* ruling in *Ute Indian Tribe v. State of Utah*, in which the State did participate as a party; and (3) the State of Utah may assert jurisdiction over non-Indians and non-member Indians within those portions of the original Uintah Valley Reservation "that were settled under the homestead and townsite laws pursuant to the 1905 Presidential Proclamation." Brief of Ute Indian Tribe at 11-13. In other words, the allocation of jurisdiction and governmental power in the Uintah Basin is defined by two inconsistent Reservation boundary overlays—one which allocates power among the named parties to this lawsuit in their dealings with each other (*Ute Indian Tribe*) and one that applies to everyone else (*Hagen*).

(b) Collateral Estoppel vs. *Stare Decisis*

The State and Local Defendants counter the Tribe's analysis by pointing out that "almost none of the Supreme Court's reservation disestablishment cases involved the affected tribe as a party, yet those cases dispositively determined the land status of the affected lands one way or the other," (Defendants' Memorandum at 8 (footnote omitted)), and that even *Montana v. United States* recognized that collateral estoppel may not apply where there has been a change in the governing law. *Id.* at 10 (citing *Montana,* 440 U.S. at 155, 99 S.Ct. at 974). The State and Local Defendants further contend that "[t]his Court is obliged to follow the Supreme Court's decisions as binding precedent, and this requirement applies both to the Supreme Court's choice of legal standard and the result reached under that standard." *Id.* at 7 (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 947 F.2d 682, 691 (3d Cir.1991), *affirmed in part, reversed in part,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and *Soto-Lopez v. New York City Civil Service Comm'n,* 755 F.2d 266, 272 (2d Cir.1985), *affirmed,* 476 U.S. 898, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986)). "The fact that the Tribe was not a party in *Hagen* . . . is irrelevant to whether this Court must follow *Hagen* in deciding whether or not to grant injunctive relief. . . . [T]he Tribe has confused the doctrines of *stare decisis* and collateral estoppel. . . ." *Id.*

Of course, *stare decisis,*[55] or the rule of precedent, represents another fundamental precept of common-law adjudication:

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[55] From *stare decisis et non quieta movere*—to abide by the precedents and not to disturb settled points.

> The idea here expressed is congenial to all law and has been expressed in many forms throughout the whole period of the common law. . . .
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> . . . Its most frequent and general use is synonymous with the doctrine of precedent as a whole. Its most restricted use is

> *Stare decisis*, briefly stated, makes each judgment a statement of the law, or precedent, binding in future cases before the same court or another court owing obedience to its decisions. It is derived from considerations of stability and equal treatment. Stare decisis has the broadest application of all the relitigation doctrines, in the sense that it applies not only to the parties in the particular case and those in privity with them, but also to strangers to the litigation. It deals only with law, as the facts of each successive case must be determined by the evidence adduced at trial, but to a certain extent, it is bounded by the facts that underly the judgment. As applied in a hierarchical system of courts, the duty of a subordinate court to follow the laws as announced by superior courts is theoretically absolute . . . .

1B JAMES W. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.401, at I-2 (2d ed. rev. 1993) (footnotes omitted). *Stare decisis* is fundamentally an institutional rule, and within our judicial system, the rule of precedent primarily serves an institutional function.

> [I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.' The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton).....

Patterson v. McLean Credit Union, 491 U.S. 164, 172, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989) (citations omitted). "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent

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to indicate the "authoritative" element of the doctrine of precedent.

Leon Green, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 40 ILL.L.REV. 303, 303 n. 1 (1946) (citations omitted).

development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991).

Stare decisis affects parties because it binds the courts before whom they appear to present their claims to follow decisions of the superior courts in the judicial heirarchy. Under this principle, "there is a general presumption that settled issue of law will not be reexamined. This presumption is fortified in the federal system by the three-tier court structure, in which the Supreme Court has a largely discretionary jurisdiction, with inferior courts that owe strict obedience to its decisions." 1B MOORE'S FEDERAL PRACTICE, *supra*, ¶ 0.402[3.—1], at I-50—I-51. Under *stare decisis*, "Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. . . . Where those principles and precedents antedate the event on which the dispute turns, the court merely applies legal rules already decided, . . ." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534, 111 S.Ct. 2439, 2442, 15 L.Ed.2d 481 (1991) (opinion of Souter, J.) (citation omitted).

Generally, a question " 'distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties,' " as the Supreme Court explained in *Montana*, already quoted above. 440 U.S. at 153, 99 S.Ct. at 973 (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897)). "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner v. Sunnen*, 333 U.S. 591, 597[, 68 S.Ct. 715, 719, 92 L.Ed. 898] (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353[, 24 L.Ed. 195] (1877)." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981).

> We have stressed that "[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . ." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917).

Id. at 401, 101 —S.Ct. at 2429.

In this case, however, the State of Utah proved successful in relitigating the Uintah Reservation boundary issue and obtaining a more favorable outcome against other parties in another forum—first before the Utah Supreme Court in *Perank, Hagen* and *Coando*, and then before the United States Supreme Court in *Hagen*. That having occurred, the State and Local Defendants now dispute the initial determination of the issue in *Ute Indian Tribe* as among these parties. According to the defendants, *Hagen* sets one fundamental precept of common-law adjudication, *stare decisis*, on a collision course with another fundamental precept, the *finality* of a judgment. *Stare decisis* ensures uniform compliance with the Supreme Court's determinations of questions of federal law. Finality ensures the conclusive resolution of disputes among the parties to a lawsuit. The defendants insist that in this context, finality must give way to uniformity.

From the plaintiff Ute Indian Tribe's standpoint, perhaps the most disquieting aspect of the defendants' position is the suggestion that the scope and extent of the tribe's jurisdictional authority—and to some extent its destiny as a governmental entity—may be decisively resolved in proceedings in which the Ute Indian Tribe itself was denied the opportunity to participate as a party, even though the Tribe had already litigated that question and obtained a final judgment deciding the issue—a final judgment ostensibly binding the State and the local governments who particiapted in that litigation as parties. The

Tribe would insist that in this context, uniformity must give way to finality.

In our system of common-law adjudication, when precedent changes the law in some resepct, a question may arise as to whom the new rule applies. "[A] decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations"—a practice that "is overwhelmingly the norm," (*James B. Beam Distilling Co. v. Georgia*, 501 U.S. at 535, 111 S.Ct. at 2443 (opinion of Souter, J.)), or a court may prescribe that the change have a more limited, even purely prospective effect. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982) (opinion of Brennan, J.). Generally, however, when the Court decides a case and applies a new legal rule to the parties before it, "it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to *all pending cases*, . . ." *Reynoldsville Casket Co. v. Hyde*, —— U.S. ——, ——, 115 S.Ct. 1745, 1748, 131 L.Ed.2d 820 (1995) (emphasis added) (citing *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993)).

A new precedent normally does not nullify prior judgments binding parties as to claims or issue already presented, decided, and resolved—as to cases no longer pending. *Stare decisis* does not operate so as to unravel the intricate tapestry of individual judgments already made final each time a new decision is announced. There are acknowledged limits to a new precedent's retroactive effect:

> Of course, retroactivity in civil cases must be limited by the need for finality, see *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371[, 60 S.Ct. 317, 84 L.Ed. 329] (1940); once a suit is

> barred by res judicata . . . a new rule cannot reopen the door already closed. It is true that one might deem the distinction arbitrary, . . .: why should someone whose failure has otherwise become final not enjoy the next day's new rule, from which victory would otherwise spring? . . . Insofar as equality drives us, it might be argued that the new rule should be applied to those who had toiled and failed, but whose claims are now precluded by res judicatas; . . .
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> . . . While those whose claims have been adjudicated may seek equality, a second chance for them could only be purchased at the expense of another principle. " 'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties.' " *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401[, 101 S.Ct. 2424, 2429, 69 L.Ed.2d 103] (1981) (quoting *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525[, 51 S.Ct. 517, 518, 75 L.Ed. 1244] (1931)). Finality must thus delimit equality in a temporal sense, and we must accept as a fact that the argument for uniformity loses force over time
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> . . . .

James B. Beam Distilling Co. v. Georgia, 501 U.S. at 541, 542, 111 S.Ct. at 2446, 2447 (opinion of Souter, J.) Citations omitted).

The State of Utah and indeed, the city and county defendants, routinely enjoy the benefit of the constraints imposed on the operation of *stare decisis* by considerations of finality—the idea that after final judgment, "a new rule cannot reopen the door already closed." *Id.* at 541, 111 S.Ct. at 2446. They rest confident in the knowledge, for example, that a myriad of prior state criminal convictions will not be reopened each time the United States Supreme Court adopts a new reading of constitu-

tional criminal procedure. *See generally Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987) (new rules apply retroactively to all criminal cases pending on direct review); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (new rule will not relate back to govern state convictions challenged on habeas corpus).

Most recently, following nearly identical principles, the Tenth Circuit concluded that *Hagen* does not apply retroactively to invalidate prior federal convictions involving offense conduct occurring within the limits of the Uintah Reservation as defined in *Ute Indian Tribe*. In *United States v. Cuch*, 79 F.3d 987 (10th Cir.1996), the court of appeals affirmed Judge Sam's denial of post-conviction collateral review[56] sought by individual Indian offenders who argued that because their crimes took place within the "opened" portion of the Uintah Reservation (*e.g.*, in Roosevelt, Utah), their convictions were void for lack of jurisdiction under *Hagen* and their sentences should therefore be vacated pursuant to 28 U.S.C. § 2255 (1994).

Judge Stephen Anderson, writing for the Tenth Circuit in *Cuch*, read *Hagen* to this effect: "the Supreme Court held that the state had jurisdiction to prosecute Hagan because Congress had diminished the Uintah Reservation in the early 1900s," and as a result, "[t]he *Hagen* decision effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, redefined the Reservation boundaries resulting from our earlier decision, and conclusively settled the question." *Cuch*, 79 F.3d at 989. Nevertheless, the court of appeals declined to vacate the movants' sentences:

> The argument that a jurisdictional ruling such as *Hagen* should not be applied retroactively to cases on collateral review is based on principles of finality and fundamental fairness. As the Court emphasized in

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[56] *See United States v. Cuch*, 875 F.Supp. 767 (D.Utah 1995).

> *Teague v. Lane*, 489 U.S. 288, 309[, 109 S.Ct. 1060, 1074, 103 L.Ed.2d 334] (1989), "the principle of finality . . . is essential to the operation of our criminal justice system." Consequently,
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> > "[t]he interest in leaving concluded litigation in a state of repose . . . may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed."
>
> *Id.* at 306[, 109 S.Ct. at 1073] (quoting *Mackey v. United States*, 401 U.S. 667, 683, 91 S.Ct. 1171, 1175, 28 L.Ed.2d 388 (1971) (Harlan, J., concurring in judgments in part, dissenting in part)). *Hagen* was decided after these movants' convictions became final. Its result "was not dictated by precedent existing at [that] time." *Id.* at 301, 109 S.Ct. at 1070 (emphasis omitted). Thus, its holding should not provide the basis for collateral attack in these cases. *See Gilmore v. Taylor*, 508 U.S. 333, 338, 113 S.Ct. 2112, 2116, 124 L.Ed.2d 306 (1993); . . .

Id. at 991 (footnotes & citations omitted).[57] Clearly, the principle of finality played a decisive role in the court's reasoning in *Cuch:*

> We emphasize that these are cases on collateral review. The convictions are final. Direct appeal times have passed. Furthermore, the federal courts were the only tribunals available, both pursuant to our decisions and by intergovernmental pact. The state of

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[57] Quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6, 107 S.Ct. 708, 712 n. 6, 93 L.Ed.2d 649 (1987), the court of appeals elaborated: " 'By "final," we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.' " *Cuch*, 79 F.3d at 991 n. 9.

> Utah was barred from prosecuting such crimes from 1976 to 1994 by state stipulations and orders, federal injunctions, and *conclusive federal litigation to which it was a party*. Case law binding the state, affirmed by this court sitting *en banc*, with certiorari denied by the Supreme Court, required exclusive federal jurisdiction. . . .

Id. at 992 (emphasis added).[58]

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[58] The court of appeals also addressed the view expressed by a magistrate judge *in Cuch* "that *Hagen* did not effect a 'change' in federal law, but merely clarified what had been the law all along," that *Ute Indian Tribe* " 'made an erroneous interpretation of federal law,' " that " 'Congress had already defined the limits of federal jurisdiction' " and that " '[i]t was the inability to see the jurisdictional line drawn by Congress that created the problem.' " *Cuch*, 79 F.3d at 994.

> The magistrate judge's analysis partakes of the Blackstonian common law view that courts do no more than discover the law. *Linkletter v. Walker*, 381 U.S. 618, 622-23[, 85 S.Ct. 1731, 1733-34, 14 L.Ed.2d 601] (1965). "The Blackstonian view ruled English jurisprudence and cast its shadow over our own "through much of our jurisprudential history. *Id.* at 624[, 85 S.Ct. at 1734-35]. But American law drawing, as it does from experience, gradually recognized that "such a rule was out of tune with actuality." *Id.; see also* id. at 629[, 85 S.Ct. at 1737]. In time the Supreme Court admitted that "[t]he past cannot always be erased by a new judicial declaration," *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374[, 60 S.Ct. 317, 318, 84 L.Ed. 329] (1940). "Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination." *Id.* In short, while a judicial decision is in effect, "it is . . . an existing juridical fact." *Linkletter*, 381 U.S. at 624[, 85 S.Ct. at 1734-35] (discussing Austinian view).
>
> This latter view is now firmly established in the federal courts. . . .

Id. at 994-95. *Cuch* further notes that "[w]hile later cases have overruled the specific retroactivity test announced in *Linkletter*, *see, e.g., Griffith v. Kentucky*, 479 U.S. 314[, 107 S.Ct. 708, 93 L.Ed.2d

Without addressing the principle of finality or its effect on *stare decisis*, the State and Local Defendants argue that a Supreme Court decision finding diminishment of reservation boundaries (*e.g., Hagen*) may have binding effect under *stare decisis* even absent the affected tribe's participation. Indeed, of the six Supreme Court reservation boundary cases cited by the defendants, only *Rosebud Sioux Tribe v. Kneip* joined both tribal and state governments in the same litigation. Defendants' Memorandum at 8-9 & nn. 6-7.[59]

At the same time, however, none of the referenced cases *relitigated* a reservation boundary issue after it had already been decided in prior litigation directly involving the affected tribal, state, and local governments as parties.[60] With the exception of the Rosebud Sioux Tribe, none of the affected tribes in *Solem, DeCoteau, Mattz, Seymour*, or *Pelican* appear to have taken affirmative steps to obtain declaratory relief concerning reservation bound-

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649] (1987), the cases have continued to recognize the validity of *Linkletter*'s underlying premise. . . ." *Id.* at 995 n. 16 (citations omitted).

[59] *See Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914).

[60] The most analogous case in that regard, *Solem*, addressed the reservation boundary issue in the context of a federal habeas corpus proceeding, reaching a result that was inconsistent with two prior state appellate decisions, *State v. Janis*, 317 N.W.2d 133 (S.D.1982), and *Stankey v. Waddell*, 256 N.W.2d 117 (S.D.1977). 465 U.S. at 465-466 & n.4, 104 S.Ct. at 1161-64 & n. 4. While the Cheyenne River Sioux Tribe filed *amicus curiae* briefs in all three cases, it was not joined as a party to any one of them; the state was a party in *Solem* and *Janis*, both of which arose out of state criminal prosecutions.

aries before the Supreme Court ruled. Here, the Ute Indian Tribe plainly had obtained such affirmative relief in advance of *Hagen*.

While the Tenth Circuit reads *Hagen* as "effectively overrul[ing] the contrary conclusion reached in the *Ute Indian Tribe* case, redefin[ing] the Reservation boundaries resulting from our earlier decision, and conclusively settl[ing] the question," (*Cuch*, 79 F.3d at 989), it does not afford the new precedent unlimited reach. *Cuch* explicitly holds that *Hagen* does not operate to reopen final judgments in criminal cases in the context of collateral review under 28 U.S.C. § 2255.

The case law cited by the Utah Supreme Court in footnote 3 of *Perank* as suggesting that the State of Utah was *not* collaterally estopped from relitigating the boundary issue as against *different* parties in *Perank*, *Hagen* and *Coando*, seems to state as firmly that the State *is* collaterally estopped from relitigating the boundary issue as against the Ute Indian Tribe. In *United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984), cited in *Perank*, 858 P.2d at 931 n. 3, the Supreme Court points out that "where the parties are the same, estopping the Government spares a party that has already prevailed once from having to relitigate. . . ." 464 U.S. at 164, 104 S.Ct. at 574. In *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984), also cited in *Perank*, the Court held that mutual collateral estoppel precluded the Environmental Protection Agency from relitigating the application of provisions of the Clean Air Act to inspections of a Stauffer plant in Tennessee where Stauffer had prevailed in litigating the same issue in a prior Tenth Circuit case involving EPA inspection of a Stauffer plant in Wyoming: "the doctrine of mutual defensive collateral estoppel is applicable against the Government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts."

464 U.S. at 165, 104 S.Ct. at 575. "As commonly explained," *Stauffer Chemical* noted, "the doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action." *Id.* at 170-71, 104 S.Ct. at 578-79. The policy argument noted in *Perank, viz.*, that it may be preferable to allow relitigation by the State as to "a decision on an issue of such substantial public importance that will inevitably recur, . . . even if res judicata were otherwise applicable against the State," (858 P.2d at 931 n. 3), proves to be an argument "persuasive only to prevent the application of collateral estoppel against the Government in the absence of mutuality. When estoppel is applied in a case where the Government is litigating the same issue arising under virtually identical facts against the same party, as here, the Government's argument loses its force." *Stauffer Chemical,* 464 U.S. at 173, 104 S.Ct. at 579-80.

At least as to parties with whom the State has litigated and lost, the State is not free to "litigat[e] the same issue arising under virtually identical facts against the same party" over and over again until it obtains a more favorable result.[61] While the res judicata and collateral estoppel doctrines do not carry the compelling force of a constitutional requirement, the common wisdom that litigants are rightfully entitled to have but *one* "bite at the apple" reflects the important societal values intrinsic in the *finality* of court judgments, even in instances of litigation among

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[61] The same idea finds expression in, *e.g.*, the Double Jeopardy Clause of the Fifth Amendment. *See, e.g., Green v. United States,* 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957) ("The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, . . .").

competing sovereigns.[62] As the United State Supreme Court observed in *Montana v. United States* (a case involving litigation between sovereigns), the doctrines of res judicata and collateral estoppel remain "central to the purpose for which civil courts have been established, *the conclusive resolution of disputes within their jurisdictions.*" 440 U.S. at 153, 99 S.Ct. at 973 (emphasis added).

(c) Collateral Estoppel and Reservation Boundary Litigation

Some guidance as to the role of collateral estoppel in reservation boundary litigation may be gleaned from *White Earth Band of Chippewa Indians v. Alexander,* 518 F. Supp. 527 (D.Minn.1981), *affirmed,* 683 F.2d 1129 (8th Cir.1982), *cert. denied sub nom. Counties of Mahnomen and Clearwater, Minnesota v. White Earth Band of Chippewa Indians, and Alexander v. White Earth Band of Chippewa Indians,* 459 U.S. 1070, 103 S.Ct. 488, 489, 74 L.Ed.2d 631 (1982). In *White Earth Band,* the Band filed a complaint in federal district court in 1974, seeking declaratory and injunctive relief against state officials and the State of Minnesota regarding competing claims of jurisdiction over the White Earth Chippewa Reservation located within that State. Three Minnesota counties and four individuals intervened. 683 F.2d at 1132.

In *State of Minnesota v. Clark,* 282 N.W.2d 902 (Minn. 1979), *cert. denied,* 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980), the Minnesota Supreme Court de-

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[62] Absent some measure of finality, the Tribe would have accomplished essentially nothing by seeking and obtaining a final judgment granting relief under the Declaratory Judgments Act, 28 U.S.C. § 2201 (1994), in an attempt to resolve the boundary issue more than two decades ago. Such a result would plainly frustrate the purpose of the Declaratory Judgment Act, a remedy well suited to a controversy such as this. *See* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 100, at 713-14 (5th ed. 1994) (the Act "creates a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, . . .").

termined that the White Earth Chippewa Reservation was not disestablished by 1889 allotment legislation which, *inter alia,* provided for cession of four of the reservation's thirty-six townships, or approximately 92,000 acres. 282 N.W.2d at 908. The *White Earth Band* litigation meanwhile had been "held in abeyance by agreement of the parties and with court approval" while the *Clark* litigation (involving criminal prosecution of White Earth Band members on the theory that the reservation had been disestablished) proceeded through the state courts. 683 F.2d at 1132-1133. Relying on *Clark,* the district court in *White Earth Band* held that the reservation was "diminished" to the extent of the four-township cession, but that the remaining thirty-two township reservation continued to exist. 518 F.Supp. at 534. The district court entered an order precluding "further litigation of the disestablishment issue as it affected the thirty-two townships and issued a permanent injunction prohibiting the state from enforcing its gaming laws against Band members within the thirty-two townships." 683 F.2d at 1133.

On appeal from the district court's preclusion order, the state, county, and individual parties asserted that a significant change in the law rendered collateral estoppel inapplicable to the disestablishment issue and further, that "the collateral estoppel bar should not be applied because the purposes of the doctrine are not met in this case." *Id.* at 1134. The Eighth Circuit rejected both arguments, declaring that "further inquiry into the status of the thirty-two township area would result in needless litigation." Id. at 1135 (citing *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979)).

> In the present case the parties agree that the technical requirements of collateral estoppel are satisfied pursuant to the four-part analysis of *Oldham v. Pritchett,* 599 F.2d 274 (8th Cir.1979). According to the *Oldham* court, collateral estoppel is appropriate where:

> (1) the issue . . . [is] . . . identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privy with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id. at 279.

. . . .

> . . . Assuming arguendo that the disestablishment issue is a question of law, the "legal change" exception to collateral estoppel is not available here because the court in *Clark* had *DeCoteau, Rosebud,* and *United States v. Minnesota*[, 466 F.Supp. 1382 (D.C. Minn.1979)] before it when it found that the Nelson Act had not disestablished the thirty-two townships. The *Clark* court applied the correct standard to resolve the disestablishment issue. . . .
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> . . . .
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> . . . [R]eopening litigation of this particular disestablishment issue would not minimize the possibility of differing adjudications on disestablishment issues. The Nelson Act treated various bands or tribes and reservations differently, . . . and contemplated that a separate agreement would be negotiated with individual bands or tribes pursuant to the Act. . . . When a court has determined disestablishment of a given reservation in its particular historical and factual setting, prevention of inconsistent adjudication becomes desirable insofar as it fosters reliance on judicial decision making.

683 F.2d at 1134, 1135 (citations omitted). The Eighth Circuit concluded that the district court "did not abuse its discretion in finding that the counties had a full and fair opportunity to litigate their claims in *Clark* and are collaterally estopped from relitigating the question of disestablishment." *Id.* at 1135.

As *White Earth Band* demonstrates, collateral estoppel may operate to preclude relitigation of an Indian reservation boundary issue by state and local governments where a court has already determined the issue "in its particular historical and factual setting" and where those entities "had a full and fair opportunity to litigate their claims." The policies underpinning collateral estoppel—" 'protecting litigants from the burden of relitigating an identical issue with the same party . . . and . . . preventing needless litigation' " (*id.* at 1133 (quoting *Parklane Hosiery*, 439 U.S. at 326, 99 S.Ct. at 649)—are no less meaningful in the context of reservation diminishment cases than in other kinds of litigation, particularly where the affected governmental entities have been participating as parties.[63]

(d) Collateral Estoppel and "Controlling Legal Principles"

The State and Local Defendants assert in this case that the doctrine of collateral estoppel "has no application where there has been an intervening change in legal principles." Defendants' Memorandum at 10. Yet cases such as *Stauffer Chemical* appear to draw a distinction between the announcement of general rules of law—"controlling legal principles"—and more particularized findings applying legal rules to specific facts. In *Montana v. United States*, the Court rejected the Government's position that "controlling legal principles" had changed, excepting that litigation from the collateral estoppel effect of a prior Montana Supreme Court ruling; in fact, the Government's

[63] Parties would be ill-advised to read *Hagen* as an open invitation to relitigate issues already determined in litigation in which they have participated, where the disposition of the issues has been incorporated into a final judgment of this court, the United States Court of Appeals for the Tenth Circuit, or any other court of competent jurisdiction. Where a party has come into court seeking judicial resolution of a dispute, merely characterizing an issue as one of "substantial public importance" gives no party *carte blanche* to disregard the court's judgment altogether and attempt to relitigate the same issue either in another lawsuit or another forum.

own pleadings in that case "suggest[ed] the absence of any major doctrinal shifts since the Montana Supreme Court's decision." 440 U.S. at 161-162, 99 S.Ct. at 977-978.

> Because the factual and legal context in which the issues of this case arise has not materially altered since [Peter Kiewit Sons' Co. v. State Bd. of Equalization] *Kiewit I,* [161 Mont. 140, 505 P.2d 102 (1973),] normal rules of preclusion should operate to relieve the parties of "redundant litigation [over] the identical question of the statute's application to the taxpayer's status." *Tait v. Western Maryland R. Co.,* 289 U.S. 620, 624[, 53 S.Ct. 706, 707, 77 L.Ed. 1405] (1933). . . .

Id. at 162, 99 S.Ct. at 978 (citation omitted). The Court also rejected the assertion that collateral estoppel did not apply in *Montana* because the Government had raised " 'unmixed questions of law' in successive actions involving substantially unrelated claims." *Id.* Quoting *United States v. Moser,* 266 U.S. 236, 242, 45 S.Ct. 66, 67, 69 L.Ed. 262 (1924), the Court further stated, " '[A] *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.' " *Id.* (emphasis added by the Court).

Stauffer Chemical also discussed the "unmixed question of law" exception, admitting "uncertainty as to its application." 464 U.S. at 171, 104 S.Ct. at 578. However, "for the purpose of determining when to apply an estoppel," the Court agreed that

> "[w]hen the claims in two separate actions between the same parties are the same or are closely related . . . it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion. . . . In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue

> in what is essentially the same controversy, even if the issue is regarded as one of 'law'." Restatement (Second) of Judgments § 28, Comment *b* (1982).

Id. (footnote omitted).

In the context of this litigation, *Hagen* does not purport to alter or depart from the "fairly clean analytical structure" established by "[o]ur precedents in the area"—the three-factor approach articulated in *Solem v. Bartlett,* 465 U.S. 463, 469-71, 104 S.Ct. 1161, 1165-67, 79 L.Ed.2d 443 (1984). *Hagen,* 510 U.S. at 408-09, 114 S.Ct. at 964. *Hagen* works no deliberate change in "controlling legal principles," if understood to refer to general rules of law. Any "change" wrought by *Hagen* must be found in the *application* of the *Solem* analysis to the "particular historical and factual setting" of the Uintah Reservation—"what is essentially the same controversy, even if the issue is regarded as one of 'law'," as was decided among these parties more than ten years ago in *Ute Indian Tribe.*

Be that as it may, this court need not determine *Ute Indian Tribe*'s "validity for collateral estoppel purposes" (Defendants' Memorandum at 24) in this proceeding. Here, the question of *Ute Indian Tribe*'s finality or conclusiveness does not arise in a collateral proceeding, to be decided according to the doctrine of collateral estoppel. It arises from a much more immediate and fundamental source.

The "Mandate Rule"

"Law of the case" rules have developed "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURES § 4478, at 788 (1981).

> Of these rules, the most compelling is the mandate rule. This fundamental rule binds every court to

> honor rulings in the case by superior courts. As the Supreme Court has stated, "In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403 (1948). The statutory authority for the power of the appellate courts dates from the first Judiciary Act of 1789 and is now found in 28 U.S.C. § 2106.

Casey v. Planned Parenthood of Southeastern Pennsylvania, 14 F.3d 848, 856 (3d Cir. 1994) (footnotes omitted).[64] "The so-called 'mandate rule' is simply a subspecies of the venerable 'law of the case' doctrine, a staple of our common law as old as the Republic. . . ." *Federated Rural Electric Insurance Corp. v. Arkansas Electric Cooperatives, Inc.*, 896 F.Supp. 912, 914 (E.D.Ark. 1995) (citation omitted).

> Whatever was before the [superior] Court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it, further than to settle so much as has been remanded.

Sibbald v. United States, 37 U.S. (12 Pet.) 488, 492, 9 L.Ed. 1167 (1838). Indeed, "the rule has remained

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[64] 28 U.S.C. § 2106 (1994) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

essentially unchanged in nearly one hundred and fifty years":

> It is axiomatic that on remand for further proceedings after decision by an appellate court, the trial court must proceed in accordance with the mandate and the law of the case as established on appeal.
>
> A trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.

Casey v. Planned Parenthood of Southeastern Pennsylvania, 14 F.3d at 857 (quoting *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir.1985) (citations omitted)). "The rule ensures 'careful observation of [the] allocation of authority' established by the three-tier system of federal courts which 'is necessary for a properly functioning judiciary.'" *Id.* (quoting *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506, 1508 (11th Cir.1987)).

In this Circuit, "The rule is well established that a district court must comply strictly with the mandate rendered by the reviewing court. *See Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 584-85 (D.C.Cir.1980) (district court has 'no power to reconsider issues laid to rest' on prior appeal)." *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America,* 962 F.2d 1528, 1534 (10th Cir.), *cert. denied,* 506 U.S. 956, 113 S.Ct. 414, 121 L.Ed.2d 337 (1992). *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir. 1991), *cert. denied,* 504 U.S. 910, 112 S.Ct. 1941, 118 L.Ed.2d 547 (1992) ("Among the law of the case rules is the obligation of every court to honor the rulings of a court that stands higher in the hierarchical judicial structure. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure,* § 4478 at 788.").

> The "law of the case" doctrine requires every court to follow the decisions of courts that are higher in

> the judicial hierarchy. *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir.1991), *cert. denied*, [504] U.S. [910], 112 S.Ct. 1941, 118 L.Ed.2d 547 (1992); *Heathcoat v. Potts*, 905 F.2d 367, 370 (11th Cir.1990); see generally 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4478 (1993). The doctrine applies to issues previously decided, *Quern v. Jordan*, 440 U.S. 332, 347, n. 18, 99 S.Ct. 1139, 1148, n. 18, 59 L.Ed.2d 358 (1979), either explicitly or by necessary implication. *Heathcoat*, 905 F.2d at 370; *Cherokee Nation v. Oklahoma*, 461 F.2d 674, 678 (10th Cir.), *cert. denied*, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 489 (1972).

Guidry v. Sheet Metal Workers Intern. Ass'n, Local No. 9, 10 F.3d 700, 705-706 (10th Cir.1993). *See generally Anthony v. Baker*, 955 F.2d 1395, 1397 n. 1 (10th Cir. 1992) (law of the case doctrine encompasses both explicit and implicit decisions of reviewing court).

In addressing the scope and effect of the "mandate rule," one must be careful to distinguish the principle from the terminology used to identify it. "Law of the case terminology is often employed to express the principle that inferior tribunals are bound to honor the mandate of superior courts within a single judicial system. . . ." 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478, at 792, 793 (1981) (footnote omitted).[65] Yet the "law of the case" established by a higher court's mandate does not operate according to the same principles as the "law of the case" reflected in a court's own rulings.

> It is often stated that the decision of an appellate court on an issue of law becomes the law of the case on remand. *This application of the doctrine lacks*

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[65] This litigation belies the remark by Professors Wright, Miller and Cooper that "[t]his principle is so straight-forward as to present few interesting problems." *Id.* at 793.

> *completely the flexibility of the same doctrine as applied to the law decided by the trial court prior to judgment.* In this situation the district court owes obedience to the mandate of the Supreme Court or the court of appeals and must carry it into effect according to its terms. It can be compelled to do so by mandamus, or by a second appeal.

1B JAMES W. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.404[10], at II-58—II-60 (2d ed. rev. 1993) (emphasis added & footnotes omitted). That a district court may alter or abandon its own prior ruling, or "law of the case," does not mean that a district court may alter or ignore an appellate court mandate—even where the reasons for doing so are equally compelling—simply because the mandate is also termed the "law of the case." The principles and policies involved differ, regardless of the sameness of their labeling.

In the context of an appellate court mandate,

> There is some uncertainty whether a lower court must seek permission from an appellate court before departing from the mandate on the ground that intervening changes in the law require re-examination of issues actually decided, but this is more a problem of sound relationships within the judicial hierarchy than a problem of stability within a single proceeding.

18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478, at 793-94 (1981) (footnote omitted). The commentary cites to *Crane Co. v. American Standard, Inc.*, 603 F.2d 244, 248-49 & n. 8 (2d Cir.1979), which in turn cites to *Higgins v. California Prune and Apricot Grower, Inc.*, 3 F.2d 896, 897 (2d Cir.1924), and *Rankin v. Atlantic Maritime Co.*, 117 F.Supp. 253 (S.D.N.Y.1953).

In *Higgins*, the Second Circuit observed that "feeling bound by the mandate of this court" on remand following a prior appeal, the district court had declined—"rightly, as we think"—to consider effect of *Kline v. Burke Constr.*

Co., 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922), a subsequent Supreme Court decision seeming to lead to a result contrary to the mandate. Judge Learned Hand, writing for the Second Circuit in *Higgins*, continued: "If, however, we are free to reconsider our earlier decision at all, there would seem to be no question of our duty to follow the later decision of the Supreme Court. We think we are so free, . . ." 3 F.2d at 897.

> [I]t is now well settled that the "law of the case" does not rigidly bind a court to its former decisions, but is only addressed to its good sense. . . . There can be surely be no greater reason for changing our views than because the Supreme Court has directly ruled upon the precise point in the interim.

Id. at 898 (citations omitted).[66]

Higgins highlights the critical difference in posture between the court of appeals and the district court in dealing with the effect on a mandate of a later Supreme Court decision: what may be deemed *reconsideration* of an earlier ruling—"changing our views"—at the court of appeals level may well be deemed *noncompliance* if undertaken at the district court level.[67] The difference is one of power.

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[66] *Accord, Zdanok v. Glidden Co.*, 327 F.2d 944, 951 (2d Cir.) cert. denied, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964) ("[I]f, before a case in a district court has proceeded to final judgment, a decision of the Supreme Court demonstrates that a ruling on which the judgment would depend was in error, no principles of 'the law of the case' would warrant a failure on our part to correct the ruling"), *aff'd*, 370 U.S. 530 (1962); *Fogel v. Chestmutt*, 668 F.2d 100, 109 (2d Cir.1981) (considering Supreme Court decision intervening between first and second appeals), *cert. denied*, 459 U.S. 828, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982).

[67] And "[d]isobedient district judges . . . are not infrequently corrected for failure to honor the mandate rule as the law of the case on remand." 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478, at 792-93 (footnote omitted).

In *Rankin v. Atlantic Maritime Co.*, the question of the effect of a subsequent Supreme Court decision upon a prior court of appeals mandate was raised before the district court, but only *after* a party had sought and obtained leave *at the court of appeals level* for the district court to consider the effect of that more recent Supreme Court ruling:

> While awaiting trial [following remand] the Supreme Court on May 25, 1953 decided *Lauritzen v. Larsen*, [345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254], whereupon defendant sought and obtained an order in the Court of Appeals granting leave to this court to entertain "a certain motion in this cause". Defendant now moves to dismiss. . . .
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> . . . .
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> Plaintiff urges that the doctrine of *res judicata* precludes decision of the instant motion. The 'law of the case' obstacle, which would otherwise have precluded a decision of this motion, was removed by the order of the Court of Appeals granting permission to this court to entertain it. I take such order to mean that the Court of Appeals intended that the motion be decided on the merits with the guidance of the Larsen decision. Otherwise, the appellate court's entertainment of that motion would have been a futile gesture.

117 F.Supp. at 254 (footnote omitted).

The "law of the case" as reflected in a court's own rulings involves a question of practice, not one of power. "A court that makes a decision has the *power* to reconsider it, so long as the case is within its jurisdiction." 1B MOORE'S FEDERAL PRACTICE ¶ 0.404[1], at II-2 (emphasis in original). *See, e.g., Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir.1991), *cert. denied*, 504 U.S. 910, 112 S.Ct. 1941, 118 L.Ed.2d 547 (1992). The "law of the case" as reflected in a court of appeals' mandate necessarily represents an exercise of supervisory

power of the appellate tribunal over the lower court. "[A]fter the law of the case is determined by a superior court, the inferior court lacks authority to depart from it, and any change must be made by the superior court that established it, or by a court to which it, in turn, owes obedience." 1B MOORE'S FEDERAL PRACTICE ¶ 0.404[1], at II-2—II-3.

Exceptions to the Mandate Rule?

The command given by the mandate rule seems clear: follow the mandate. Nevertheless, some courts relying on "law of the case" terminology "have recognized a few exceptions which might allow a matter to be revisited."

> They are (1) the availability of new evidence, (2) an intervening change of controlling law, or (3) the need to correct a clear error or prevent manifest injustice. *E.g., In re Progressive Farmers Ass'n,* 829 F.2d 651, 655 (8th Cir.1987) (on remand lower court required to follow appellate court decision unless new evidence introduced or decision is clearly erroneous and works manifest injustice); cited in *Bethea v. Levi Strauss,* 916 F.2d 453, 457 (8th Cir.1990).

Federated Rural Electric Insurance Corp. v. Arkansas Electric Cooperatives, Inc., 896 F.Supp. at 914. *See also United States v. Bell,* 988 F.2d 247, 251 & n. 2 (1st Cir. 1993) (as a branch of the law of the case doctrine, the mandate rule "is a discretion-guiding rule subject to an occasional exception in the interests of justice"); *Thomas v. Bible,* 983 F.2d 152, 155 (9th Cir.1993) ("None of the recognized grounds justifying departure from a court of appeals' mandate under the preclusive doctrine of "law of the case," (*e.g.*, newly discovered evidence, an intervening change in governing law) are present here."); *Cameo Convalescent Center, Inc. v. Percy,* 800 F.2d 108, 110 (7th Cir.1986) (where court of appeals' decision

issued one day before Supreme Court decision that changed the law, "the district court properly applied the new law to the claim before it."); *Piambino v. Bailey*, 757 F.2d 1112, 1119-20 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169, 106 S.Ct. 2889, 90 L.Ed.2d 976 (1986). In *Leggett v. Badger*, 798 F.2d 1387 (11th Cir.1986), the Eleventh Circuit expressed the view that the mandate rule,

> usually referred to as the "law of the case" doctrine, has three exceptions that allow a federal district court to act contrary to the appellate decision: (1) when new and substantially different evidence is presented subsequent to the appeal; (2) when controlling authority has been rendered, contrary to the law of the appellate decision; (3) when the prior decision was clearly erroneous and would work a manifest injustice if implemented. *Stanley v. United States*, 786 F.2d 1490, 1498 (11th Cir.1986).

798 F.2d at 1389 (footnote omitted). *Leggett* affirmed that "the district court . . . correctly declined to enforce our mandate" in light of a subsequent Supreme Court decision to the contrary. *Id.* at 1390. Even so, the *Leggett* panel "note[d] the need to read and apply these exceptions narrowly. A district court should follow the law of the case as decided by the appellate court unless the court is certain that one of the three specifically and unquestionably applies." *Id.* at 1389 n. 2.[68]

The Eleventh Circuit has also approved a district court's departure from its mandate in light of an intervening change in controlling state law. *Ad-Vantage Telephone*

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[68] The Seventh Circuit has emphasized the narrowness of one such exception in more colorful terms: "To be clearly erroneous, a decision must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish. To be clearly erroneous, then, the . . . decision must be dead wrong, and we do not believe it is." *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir.1988), *cert. denied*, 493 U.S. 847, 110 S.Ct. 141, 107 L.Ed.2d 100 (1989).

Directory Consultants v. GTE Directories Corp., 943 F.2d 1511, 1520 (11th Cir.1991). While expressing a willingness to follow intervening state court decisions in the context of a remand for trial (*e.g., Menne v. Celotex Corp.*, 861 F.2d 1453, 1475 n. 38 (10th Cir.1988)), the Tenth Circuit specifically rejected a similar suggestion by the defendant in *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 962 F.2d 1528, 1534 (10th Cir.), *cert. denied*, 506 U.S. 956, 113 S.Ct. 414, 121 L.Ed.2d 337 (1992), in the context of a remand for entry of judgment based upon the court of appeals' disposition of the legal issues.

In a prior appeal in the *Colorado Interstate Gas* case, (885 F.2d 683 (10th Cir.1989) ("CIG II")), the Tenth Circuit had issued a mandate instructing the district court "to enter judgment in accordance with the opinion of this court" affirming an $8 million tort award in CIG's applying Wyoming law. Subsequently, the Wyoming Supreme Court decided *Price v. Sorrell*, 784 P.2d 614 (Wyo. 1989), in which it declined to adopt the legal theory relied upon by the Tenth Circuit in affirming CIG's tort claim. The defendant urged that "until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court," (*Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543, 61 S.Ct. 347, 350, 85 L.Ed. 327 (1941)), and argued that *Price v. Sorrell*, now a "controlling decision of the highest state court," required dismissal of CIG's tort claim. The Tenth Circuit held to the contrary:

> A suit is deemed " 'pending until the appeal is disposed of,' and until disposition any judgment appealed from it is still *sub judice.*" *de Rodulfa v. United States*, 461 F.2d 1240, 1253 (D.C.Cir.) (quoting *Mackenzie v. A. Engelhard & Sons Co.*, 266 U.S. 131, 142-43, 45 S.Ct. 68, 69 L.Ed. 205 (1924)),

> *cert. denied*, 409 U.S. 949, 93 S.Ct. 270, 34 L.Ed.2d 220 (1972); *Nicastro v. United States*, 206 F.2d 89, 92 (10th Cir.1953). Following appellate disposition, however, the judgment is no longer subject to district court amendment beyond the ministerial dictates of the mandate, which encompasses the full scope of jurisdictional power granted to the district court on remand.
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> . . . [W]e conclude that the question of which state law properly applied was no longer *sub judice* after this court disposed of the appeal in *CIG II* and the time for a petition for certiorari had passed.

Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America, 962 F.2d at 1534. Moreover, *Colorado Interstate Gas* eschewed the use of a motion for relief from judgment under Fed.R.Civ.P. 60(b) as a means of raising the subsequent state court decision:

> Over thirty years ago, this court held in *Collins* that "[a] change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies relief" under Rule 60(b). Id. at 839. . . . The *Collins* holding is still the rule in this circuit. *See Van Skiver v. United States*, 952 F.2d 1241, 1244-45 (10th Cir.1991).

Id. at 1535 (quoting *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir. 1958)).[69] "Thus," the Tenth Circuit concluded, "Natural had no basis on which it could have asked the district court to apply the *Price* case: *this case was already over* for purposes of selecting the governing law." *Id.* (emphasis added). At that point, the district

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[69] The Tenth Circuit declined to extend an intervening decision of its own in *Pierce v. Cook & Co.*, 518 F.2d 720, 722-23 (10th Cir.1975), which the *Colorado Interstate Gas* panel read as "finding extraordinary circumstances [under Rule 60(b)] where the change in law arose out of the same accident in which plaintiffs had been involved." *Id.*

court was duty bound to conform to the Tenth Circuit's judgment.

The Tenth Circuit Mandate in *Ute Indian Tribe* Remains in Force

The Tenth Circuit's mandate in *Ute Indian Tribe*, received and docketed by this court on December 9, 1986,[70] directs that "the cause is remanded to the United States District Court for the District of Utah for further proceedings in accordance with the opinion of this Court," referring to the Tenth Circuit's *en banc* ruling. Since that ruling decided the boundary question on the merits, leaving no remaining issues to be addressed by this court, *Ute Indian Tribe* was no longer *sub judice*[71] after December 9, 1986. The "further proceedings" contemplated by the mandate amount simply to the enforcement of the court of appeals' judgment. *See Gabaldon v. Westland Development Co., Inc.*, 485 F.2d 263, 266 (10th Cir.1973). ("The mandate was for further proceedings not inconsistent with the views of the Supreme Court. Such 'further proceedings' were, of course, to implement at the local level the ruling of the higher court.")

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[70] Under Fed.R.App.P. 41(a), "A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue." In this instance, this court received a copy of the court of appeals' judgment, dated September 17, 1985 accompanied by a copy of the opinions reflecting the *en banc* decision, also reported at 773 F.2d 1087. Reference in this Memorandum Opinion and Order to the Tenth Circuit's "mandate" embraces both of these documents.

[71] "We note that *sub judice* 'means "under judicial consideration" or in court and not yet decided.' Black's Law Dictionary 1277 (5th ed. 1979). We thus hold that the Supreme Court's denial of certiorari ended this litigation, and the case was not *sub judice* when the defendants made their rule 60(b)(6) motion." *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir.1982) (district court denial of Rule 60(b) relief based upon subsequent Fourth Circuit decision affirmed).

This court has identified no reported Tenth Circuit case permitting a district court within the Tenth Circuit to ignore the court of appeals' mandate because in the district court's mind, its judgment is inconsistent with subsequent Supreme Court precedent.[72] The court has found one reported suggestion that a district court may depart from a Tenth Circuit mandate in light of new and different evidence, but that suggestion was made in the context of a retrial after remand, while the matter still remained *sub judice:*

> In *Delano v. Kitch,* 663 F.2d 990 (10th Cir. 1981), we held that in conducting a retrial, the trial court should follow rulings of law previously made by the court of appeals. That mandate was faithfully followed by the trial court in this case. Under the "law of the case" doctrine, the district court may not deviate from the appellate court's mandate; however, the district court may reconsider an issue and disregard the appellate court mandate *if the subsequent trial produces substantially different evidence. Lindsey v. American Cast Iron Pipe Co.,* 810 F.2d 1094 (11th Cir.1987).

Mason v. Texaco, Inc., 948 F.2d 1546, 1553 (10th Cir. 1991), *cert. denied,* 504 U.S. 910, 112 S.Ct. 1941, 118 L.Ed.2d 547 (1992) (emphasis added). Similarly, *Delano v. Kitch,* cited in *Mason,* indicates that the law of the case must yield to a controlling state court decision—when that decision is issued between the first ruling and a retrial. 663 F.2d at 996. *Cf. McGhee v. Draper,* 639 F.2d 639, 646 (10th Cir.1981). Where the court of appeals has decided an issue, however, its mandate may

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[72] Likewise, the Tenth Circuit has cited to *Legett*'s treatment of law of the case, but only once, and then it was in the context of the court of appeals' review of its own prior determinations; the district court in that case was expected simply to comply with the mandate. *United States v. Monsisvais,* 946 F.2d 114, 116 (10th Cir.1991).

preclude the consideration of additional evidence on that issue after remand. *See, e.g., Fox v. Mazda Corp. of America,* 868 F.2d 1190, 1194 (10th Cir.1989) (affirming district court's exclusion of proffered expert testimony and damages model on ground it was precluded by the terms of the mandate). Even in the cases from other circuits discussed above, the purported "exceptions" to the mandate rule generally come into play only after remand for purposes of a new trial or other substantive activity. *E.g., Leggett v. Badger,* 798 F.2d 1387, 1389 (remanded for determination of award of attorney's fees). Where the merits of the controversy have been conclusively determined on appeal, "the judgment is no longer subject to district court amendment beyond the ministerial dictates of the mandate." *Colorado Interstate Gas,* 962 F.2d at 1534. "A different result would allow the district court to substitute its opinion for that of this court, which is what the law of the case doctrine is intended to avoid." *United States v. Monsisvais,* 946 F.2d 114, 118 (10th Cir. 1991).

The court of appeals expects district courts to comply with its mandate even where the Supreme Court has indicated that a party may be entitled to relief beyond that afforded by the mandate. In *Citizen Band of Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Comm'n,* 969 F.2d 943 (10th Cir.1992), the Tenth Circuit affirmed the district court's denial of injunctive relief requiring the tribe to collect state cigarette taxes consistent with its obligations under *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe,* 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).

> Nothing in the District Court's order on remand precludes the Tax Commission from pursuing the remedies that the Supreme Court has indicated are available to it.

> The district court precisely followed our remand order which instructed it to dismiss the Tax Commission's counterclaim and enter an injunction prohibiting the Tax Commission from enforcing the challenged assessment for previously uncollected taxes against the Tribe. . . . In going no further, the district court recognized its lack of discretion when confronted with a specific mandate by this court. *See Rutherford v. United States*, 806 F.2d 1455, 1460 (10th Cir.1986) ("district court is . . . bound by the appellate court mandate"). . . .

969 F.2d at 947-48.

This court does not sit in review of judgments of the court of appeals. As tempting as that prospect may sometimes be, Congress has espoused the opposite approach since creating the circuit courts of appeal in 1891,[73] and forming the Tenth Circuit in 1929,[74] a court renamed the United States Court of Appeals for the Tenth Circuit in 1948. *See* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 3, at 10 (5th ed. 1994). Given the institutional structure as it exists, with its corresponding allocation of power (*see* 28 U.S.C. § 2106), this court must abide by the court of appeals' mandates unless and until it receives different instructions from the court of appeals. While "[l]aw of the case principles do "not bar a district court from acting unless an appellate decision has issued on the merits of the claim sought to be precluded," [75] here the Tenth Circuit plainly determined the diminishment issue by applying the *Solem* analysis to the Uintah Reservation in its particular historical and factual setting. *Hagen* ap-

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[73] *See* Evarts Act, Act of March 3, 1891, ch. 517, 26 Stat. 826.

[74] *See* Act of February 28, 1929, ch. 363, 45 Stat. 1346.

[75] *Wilmer v. Board of County Commissioners of Leavenworth County*, 69 F.2d 406, 409 (10th Cir.1995) (quoting *United States v. Caterino*, 29 F.3d 1390, 1395 (9th Cir.1994)).

plied the *Solem* analysis to the same setting, reaching a different result. Both decisions were rendered on the merits.

This court may not substitute its own view for that of the appellate court in either instance.

Recall of the Mandate

Mechanisms do exist for revisiting a court of appeals' mandate where a second look seems warranted. As explained by one well-known treatise:

> If circumstances arise that cast doubt on the correctness of the law of the case as established on appeal, arguments in support of departure must be addressed to the appellate court, either in a petition for rehearing, or if the time for filing a motion for rehearing has passed, by motion for recall of the mandate, or on appeal from the judgment rendered after completion of the proceedings for which the case was remanded.

1B JAMES W. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.404[10], at II-60—II-61 (2d ed. rev. 1993) (footnotes omitted).[76] The Tenth Circuit acknowledges that a party may "seek . . . to have this court recall its mandate for any correction it thought was necessary to the district court's judgment." *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 962 F.2d

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[76] *Moore's Federal Practice* further suggests that "[e]ven after judgment is entered on the mandate, however, the district court has the power to consider a motion under Rule 60(b) for relief from judgment, without first obtaining the permission of the court of appeals." 1B MOORE'S FEDERAL PRACTICE ¶ 0.404[10], at II-61 (footnote omitted) (citing *LSLJ Partnership v. Frito-Lay, Inc.*, 920 F.2d 476 (7th Cir.1990)). However, the Tenth Circuit appears to discourage that approach, at least in cases where the merits have been determined on appeal and are no longer *sub judice*. *See* discussion *infra*.

1528, 1533 n. 3 (10th Cir.), *cert. denied*, 506 U.S. 956, 113 S.Ct. 414, 121 L.Ed.2d 337 (1992).

The Navajo Nation sought reconsideration of the reservation disestablishment issue in *Yazzie* using precisely this same procedural device: "In conjunction with the instant appeal, the Navajo Nation filed a motion pursuant to Fed.R.App.P. 27 asking this court to partially recall its earlier mandate in *Pittsburg & Midway I*."

> The Tribe asks us not to apply the doctrine of law of the case so that the reservation diminishment issue decided there may be reexamined. The law of the case is a judicial doctrine designed to promote decisional finality. Once a court decides an issue, the doctrine comes into play to prevent the re-litigation of that issue in subsequent proceedings in the same case. *Arizona v. California*, 460 U.S. 605, 618-19, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983); *United States v. Monsisvais*, 946 F.2d 114, 115-16 (10th Cir.1991). The Navajo Nation is correct that unlike the doctrines of res judicata or collateral estoppel, "the law of the case doctrine has long been considered only a rule of practice in the courts and not a limit on their power." *Id.* at 116.
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> > Nevertheless, the circumstances justifying a departure from the law of the case are narrow. The most widely quoted statement is by former Tenth Circuit Chief Judge Orie Phillips, sitting in another circuit, that the law of the case must be followed "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice."

Id. at 117 (quoting *White v. Murtha*, 377 F.2d 428, 432 (5th Cir.1967); *see also Major v. Benton*, 647

F.2d 110, 112 (10th Cir.1981)). We are persuaded that none of these three circumstances exist in the instant case, and therefore deny the Tribe's motion. *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1536 n. 4 (10th Cir.1995).

The Tenth Circuit's current reading of *Hagen*, articulated in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), that "[t]he *Hagen* decision effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, redefined the Reservation boundaries resulting from our earlier decision, and conclusively settled the question," (*Cuch* at 989), may well establish "circumstances justifying a departure from the law of the case." *Watchman*, 52 F.3d at 1536 n. 4.[11] While the Tenth Circuit has said that it may depart from its own "law of the case" on a motion to recall that court's mandate, nothing in *Watchman* even hints that the district court may disregard or defy the appellate court's existing judgment in any respect, absent such a departure by the court of appeals.

Resolution of the Questions Now Presented

A motion to recall the mandate may be filed even after the time to pursue other appellate procedures has expired. *See United States v. Winterhalder*, 724 F.2d 109 (10th Cir.1983). To date, however, it appears that no party has asked the United States Court of Appeals for the Tenth Circuit to recall its mandate in *Ute Indian Tribe* for reconsideration in light of *Hagen*.

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[11] The Tenth Circuit has acknowledged that where the Supreme Court has made it clear that a new ruling should be applied retroactively, and it would be futile to require the district court to follow its prior order and apply a standard that has been discarded by the Supreme Court, recall of the mandate is appropriate. "Although we rarely exercise such authority, this court does have the inherent power to recall the mandate after it has issued. *Abel v. West*, 932 F.2d 898, 899 (10th Cir.1991); *Hammons v. Int'l Playtex, Inc.*, 872 F.2d 963, 963 (10th Cir.1989)." *Gomez v. State of New Mexico*, 937 F.2d 616 (Table), 1991 WL 132445 (10th Cir., July 15, 1991) (No. 89-2004) (unpublished disposition).

Nor for that matter have the parties made any visible strides in the direction of an agreed long-term resolution of the jurisdictional issues remaining after both *Ute Indian Tribe* and *Hagen*.

Were these parties the only constituents of the necessary jurisdictional mix, this court might well be inclined simply to proceed with specific enforcement of the *Ute Indian Tribe* mandate nothwithstanding the State and Local Defendants' *Hagen*-based objections. However, the Tenth Circuit's *en banc* ruling in *Ute Indian Tribe* does not reach one party indispensable to a practical allocation of jurisdiction within "Indian country": the United States.

If the United States abides by the Supreme Court's decision in *Hagen*—as one normally would expect the United States to do—it must decline to exercise jurisdiction over offenses involving Indians committed within the lands "opened" in 1905. At the same time, *Ute Indian Tribe* would constrain the State and local authorities from exercising jurisdiction over such offenses involving Ute tribal members occurring within that same area. While the Tribe may exert its own jurisdiction pursuant to *Ute Indian Tribe*, Congress has limited the powers of Indian tribes to punish serious offenses. *See* 25 U.S.C.A. § 1302(7) (Supp. 1995) (tribes shall not impose punishment "greater than imprisonment for a term of one year and a fine of $5,000, or both"); *cf. United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Moreover, if enforcing the *Ute Indian Tribe* mandate notwithstanding *Hagen* means that in matters affecting tribal members, the State and Local Defendants must treat the Reservation as "Indian country" to the full extent of its original boundaries, this may leave *no* sovereign available to punish *non-Indians* who may commit serious offenses involving Indians or Indian lands within the original boundaries of the Uintah Reservation. *See* 18 U.S.C. § 1152 (1994).[78] As the court of appeals

[78] Generally, "[c]riminal offenses by non-Indians against Indians or their property are subject to the Indian Country Crimes Act

might say, this is "an untenable prospect," and nothing this court may do in crafting a permanent injunction can fill that gap.[79]

For this reason, this court has determined forthwith to raise the question of the continuing force of *Ute Indian Tribe* in light of *Hagen v. Utah* with the court of appeals. While this court *sua sponte* can neither return the Tenth Circuit's mandate nor compel its recall, it seems wholly appropriate under these circumstances to request further instructions from the court of appeals concerning

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[18 U.S.C. § 1152 (1994)]. The Supreme Court has said that federal court jurisdiction under this Act is exclusive of state court jurisdiction." FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 353 (Rennard Strickland ed. 1982) (footnotes omitted). Even if one could say that the State and Local Defendants are not estopped under *Ute Indian Tribe* to prosecute a non-Indian offender in that instance, jurisdiction even to investigate the offense would remain in doubt until the status of a suspect is determined. Coupled with the reduced state and local law enforcement presence in "Indian country" that one might expect under *Ute Indian Tribe*, prosecution under state jurisdiction of a non-Indian committing offenses against tribal members would prove problematic at best.

In this respect, the Supreme Court itself has undertaken to limit Indian tribal sovereignty more severely than any congressional legislation. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978) (Indian tribes lack criminal jurisdiction over non-Indians as a consequence of their "dependent status"); *United States v. Wheeler*, 435 U.S. 313, 322-323, 98 S.Ct. 1079, 1085-86, 55 L.Ed.2d 303 (1978); *Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990) (Indian tribal courts lack criminal jurisdiction over Indians who are not tribal members), *legislatively overruled by* Pub.L. No. 102-137, § 1, 105 Stat. 646 (1991), codified at 25 U.S.C.A. § 1301(2), (4) (Supp. 1995). *See Mousseaux v. U.S. Comm'r of Indian Affairs*, 806 F.Supp. 1433, 1439-1443 (D.S.D.1992).

[79] This kind of practical anomaly seems markedly different from saying that collateral estoppel simply requires that the Government inspect Stauffer Chemical plants in one fashion while inspecting other manufacturers' plants in another fashion. *See United States v. Stauffer Chemical Co.*, 464 U.S. at 174, 104 S.Ct. at 580.

the proper conduct of "further proceedings in accordance with the opinion of this Court" as set forth in the mandate received on December 9, 1986.

A Request for Further Instructions

Such a request is not entirely without precedent. Section 1254(2) of the Judicial Code provides that cases in the court of appeals may be reviewed "[b]y certification at any time by a court of appeals of any question of law in any civil or criminal cases as to which instructions are desired," and upon such certification, "the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy." 28 U.S.C. § 1254(2) (1994). This provision originated in the Act of April 29, 1802, ch. 31, § 6, 2 Stat. 156, 159, and has been adapted over the years as the courts of appeals themselves have evolved. *See* 17 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4038 (2d ed. 1988). The certification mechanism contemplates that a court "may find great difficulty in resolving a question of law, and may believe the question is of such general importance that it should be resolved by the Supreme Court." *Id.* § 4038, at 105. A "somewhat comparable provision for interlocutory review in the courts of appeals," (*id.* § 4038, at 105 & n. 14), is found in 28 U.S.C. § 1292(b).[80]

The analysis of the mandate rule convinces this court that "a lower court must seek permission for an appellate

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[80] 28 U.S.C. § 1292(b) reads:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal may thereupon, in its discretion, permit an appeal to be taken from such order, . . .

court before departing from the mandate on the ground that intervening changes in the law require re-examination of issues actually decided," (18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478, at 793 (1981)), and this court's request for further instructions is expressly made with that understanding.

Standard Oil Co. v. United States, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976) (per curiam), does not hold to the contrary. *Standard Oil* held that a district court has jurisdiction to entertain a motion under Fed.R. Civ.P. 60(b) to reopen a case following review on appeal without prior leave of the appellate court or the withdrawal of the appellate mandate. In that case, the movant sought to set aside a judgment granting injunctive relief, alleging misconduct on the part of opposing counsel and a witness. Because "the appellate mandate relates to the record and issues then before the court" and "does not purport to deal with possible later events," the Court concluded that a district court would not be "flouting the mandate by acting on the motion." 429 U.S. at 18, 97 S.Ct. at 31 (citing 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2873, pp. 269-170 (1973)). The Tenth Circuit has read *Standard Oil* to this effect:

> Under the law the district court retains the power to act on a Rule 60(b) motion after this Court has resolved a matter upon appeal, and there is no necessity that a petition requesting permission to exercise such authority be filed with this Court. *Standard Oil of California v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976); *Wilkin v. Sunbeam Corporation*, 405 F.2d 165 (10th Cir.1968).

Prop-Jets, Inc. v. Chandler, 575 F.2d 1322, 1325 (10th Cir.1978).[81]

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[81] *Accord*, *Petrick v. Walters*, 81 F.3d 173 (Table), 1996 WL 131686 (10th Cir., Mar. 25, 1996) (No. 95-6356) (unpublished dis-

Even after *Standard Oil*, "[o]f course the district judge is not free to flout the decision of the appellate court as far as it goes, . . ." 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2873, at 439 (2d ed. 1995) (footnote omitted). Although *Standard Oil* confirms a district court's jurisdiction under Rule 60(b) to consider "a material change of circumstances or newly-discovered evidence" not considered on appeal—including instances in which the "change of circumstances" is purely legal—the courts of appeal generally have declined to treat a post-appeal "change in decisional law" as grounds for Rule 60(b)(6) relief from a judgment in a matter no longer *sub judice*, even "in federal cases where the Supreme Court has changed the applicable rule of law." *DeWeerth v. Baldinger*, 38 F.3d 1266, 1273 (2d Cir.1994) (Walker, J.) (citing *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 851 (5th Cir.1990)). This view appears to be consistent with the Tenth Circuit's opinion in *Colorado Interstate Gas* discussed above:

> As a corollary to this [mandate] rule, we are convinced that Rule 60(b)(6) cannot be properly used to alter the substantive content of a judgment once it has been affirmed on appeal except in extraordinary situations. To hold otherwise would be to permit a district court to violate our mandate that a judgment be entered "in accordance with the opinion of this court."

962 F.2d at 1534.[82]

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position) ("See *Standard Oil Co. of California v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976) (district court may entertain Rule 60(b) motion to reopen an judgment that has been reviewed on appeal without obtaining leave of the appellate court. . . .).").

[82] *Accord, Sack v. Wagoner County, Oklahoma*, 996 F.2d 311 (Table), 1993 WL 220593 (10th Cir.1993) (No. 92-7085, 92-7091) (unpublished disposition):

The State and Local Defendants have not framed, briefed, or argued their pending motion as a Rule 60(b) motion. Even if they had, however, cases such as *Colorado Interstate Gas* suggest that any "change in decisional law" reflected in *Hagen* cannot suffice as grounds for Rule 60(b) relief because the *Ute Indian Tribe* case was no longer *sub judice*—it "was already over" regarding the merits of the diminishment issue.[83]

Simply put, a Rule 60(b) motion made in this setting would appear futile.

These circumstances present "a problem of sound relationships within the judicial hierarchy," (18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478 at 793-794), and raise a question concerning enforcement of the court of appeals' judgment with respect to these parties that evades simple resolution. As a question of public law and the allocation of power among governments, it appears to be of such "general importance" that it should be resolved

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> The district court may entertain a rule 60(b) motion to reopen a decision that has been affirmed on appeal without obtaining leave from the appellate court. *Standard Oil Co. v. United States*, 429 U.S. 17, 18-19[97 S.Ct. 31, 31-32, 50 L.Ed.2d 21] (1976). The district court, however, must "comply strictly with the mandate rendered by the reviewing court." *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1534 (10th Cir.), cert. denied, [506 U.S. 956,] 113 S.Ct. 414[121 L.Ed.2d 337] (1992).
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> . . . In this circuit, . . . [Rule 60(b)(6)] cannot be used 'to alter the substantive content of a judgment once it has been affirmed on appeal except in extraordinary situations.' *Colorado Interstate Gas*, 962 F.2d at 1534. . . .

Id. 1993 WL 220593, at *2.

[83] *Standard Oil* thus may be read to say that a district court may consider the question under Rule 60(b), but *Colorado Interstate Gas* instructs that the answer to the question, at least under Rule 60(b)(6), shall in these circumstances be "no."

by the United States Court of Appeals for the Tenth Circuit. In light of the identified area of conflict between the court of appeals' judgment in *Ute Indian Tribe* and the Supreme Court's decision in the *Hagen* case, and the practical consequences which flow from that conflict, further instructions from the court of appeals would clearly be helpful, and would certainly be welcomed.

The court of appeals may also recall its mandate on its own motion, and sometimes it has done so. *See, e.g., Pepcol Mfg. Co. v. Commissioner of Internal Revenue*, 28 F.3d 1013 (10th Cir.1993); *Hammons v. International Playtex, Inc.*, 872 F.2d 963 (10th Cir.1989). *Cf. McCarthy v. Maddigan*, 962 F.2d 973 (10th Cir.1992) (recall of mandate following reversal by Supreme Court). Citing 28 U.S.C. §§ 2106 and 452,[84] the Tenth Circuit articulated the pertinent standard in *Coleman v. Turpen*, 827 F.2d 667 (10th Cir.1987):

> While a mandate once issued by our court will not be recalled except for good cause shown, an appellate court has power to set aside at any time a mandate that was procured by fraud *or act to prevent an injustice*, or to preserve the integrity of the judicial process. *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268 (D.C.Cir.1971), *cert. denied* 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972). And see discussion, *American Iron and Steel Institute v. E.P.A.*, 560 F.2d 589 (3rd Cir.1977); *cert. denied*, 435 U.S. 914, 98 S.Ct. 1467, 55 L.Ed.2d 505 (1978).

Id. at 671 (emphasis in original) (citing *Clarke v. Boysen*, 273 F. 923 (8th Cir.1921)). The court of appeals may construe this court's request for instructions as an invitation to recall its own mandate, should it so choose. In any

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[84] 28 U.S.C. § 452 provides in part that the "expiration of a session of court in no way affects the power of the court to do any act or take any proceeding."

event, the motions pending before this court raise a question only the court of appeals is genuinely in a position to answer.

The "Dependent Indian Communities" Question—18 U.S.C. § 1151(b)

Justice Stewart overlooked one practical consequence of that court's finding of reservation diminishment in *Perank:* the question of the applicability of 18 U.S.C. § 1151(b), which provides that "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state" are within "Indian country" within the meaning of the statute. A finding that Myton, Utah comprises a "dependent Indian community" would once again locate the town within "Indian country," with all of the jurisdictional consequences that flow from that status. *Hagen*'s conclusion that "the town of Myton . . . is not Indian country" likewise appears to be unexamined concerning the applicability of § 1151(b), and consequently may have been somewhat premature.

In the *Yazzie* case, cited by both *Hagen* and *Perank*, the Tenth Circuit held that the boundaries of the 1907-08 Addition to the Navajo Reservation were disestablished through restoration of unallotted lands to the public domain, but remanded the case "for consideration of whether some or all of P & M's South McKinley Mine is within Indian country under 18 U.S.C. §§ 1151(b) or (c). . . ." 909 F.2d at 1422. Though touched upon in the *Yazzie* opinion and addressed in detail in its companion case, *Blatchford v. Sullivan*, 904 F.2d 544-549 (10th Cir. 1990), this logical next step in the analysis was apparently overlooked by both the *Hagen* and *Perank* courts. *See also United States v. State of South Dakota*, 665 F.2d 837 (8th Cir.1981) (Indian housing project located within former Lake Traverse Reservation (*DeCoteau*) is "dependent Indian community" within § 1151(b)).

The Tenth Circuit did not address the applicability of 18 U.S.C. § 1151(b) in *Ute Indian Tribe* because the status of the communities involved as "Indian country" was subsumed in its determination that the Uintah Valley Reservation had not been diminished. Once a different conclusion is reached on the § 1151(a) reservation boundary issue, questions immediately arise as to the application of the balance of the statute—§ 1151(b), which addresses "dependent Indian communities," and possibly § 1151(c), which deems "all Indian allotments, the Indian titles to which have not been extinguished" to be within "Indian country."

While the State and Local Defendants do not dispute that Indian allotments within the original boundaries of the Uintah Valley Reservation remain "Indian country" under § 1151(c) even after *Hagen*, a determination that Myton, Randlett, Duchesne, or other towns are "dependent Indian communities" under § 1151(b) would extend federal and tribal jurisdiction to non-trust, or fee lands located within those towns.

The parties to this proceeding have acknowledged the § 1151(b) question to be a factual issue not yet ripe for determination by this court on the present record. *See, e.g., Transcript of Hearing,* dated September 12, 1994, at 55:6—18 (Mr. Andrews). This issue must therefore await the court of appeals' disposition of this court's more immediate request. Should the § 1151(b) issue become ripe for determination thereafter, the matter will likely be set down for an evidentiary hearing consistent with the analysis detailed in, *e.g., Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531, 1542-1546 (10th Cir.1995).

If nothing else, consideration of the implications of § 1151(b) will serve to remind everyone that Indian tribes are comprised of communities having "contemporary demographics" of their own, and that the Indians, too, are

"people living in the area." [85] *See, e.g.*, VERONICA E. VELARDE TILLER, ED., TILLER'S GUIDE TO INDIAN COUNTRY 573-574 (1996).

Other Issues: Uncompahgre, the Forest Withdrawals, etc.

As noted above, this court need not and does not reach any question concerning the present status of the Uncompahgre Reservation, of those lands withdrawn from the Uintah Reservation for national forest purposes; the status of both areas was determined on the merits in *Ute Indian Tribe* and neither matter was raised as an issue before the Supreme Court in the *Hagen* case. *State of Utah v. Perank* expressly did not consider the "Indian country" status of either area, (858 P.2d at 934), and counsel has identified no existing conflict between *Ute Indian Tribe* and any other reported decision affecting these areas.[86] Those questions await another day.

Pending disposition of this court's request for further instructions from the court of appeals, this court also defers any dispositive ruling on the Tribe's renewed motion for permanent injunctive relief as well as the State and Local Defendants' motion to dissolve the existing Orders allocating jurisdiction among these parties pursuant to their earlier Stipulation and to dismiss the Tribe's renewed motion for injunctive relief, (*see* Pretrial Order at 15 ¶¶ 5.D) except to the extent that the Order set forth herein further clarifies the existing Order as previously modified. *See* page 1531, *infra*.

The court also chooses to defer the disposition of several other fact-sensitive issues enumerated in the Pretrial Order, such as the status of unpatented tracts within or the subsurface estate underlying, *e.g.*, Myton, Utah, in favor of

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[85] *Hagen*, 510 U.S. at 421, 114 S.Ct. at 970.

[86] Therefore, the answer to the first issue framed in Paragraph 5.F of the Pretrial Order is "no."

consideration at a later time. *See* Pretrial Order at 14 ¶¶ 4.B, 4.C, 15 ¶ 5.E.

Summary

According to the United States Supreme Court's decision in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), the 1902-1905 Acts "opening" the Uintah Reservation to non-Indian entry and settlement operated to restore the unallotted and unreserved lands of that Reservation to the public domain. In doing so, the 1902-1905 Acts *diminished*—that is, reduced or curtailed —the boundaries of the Reservation to the extent of the lands thus "opened." Insofar as these "opened" lands were not later returned to tribal ownership and jurisdiction by subsequent congressional and administrative action, they ceased to have reservation status in 1905 and are no longer found within "Indian country" within the meaning of 18 U.S.C. § 1151 (1994). To that extent, *Hagen* stands in direct conflict with the Tenth Circuit's *en banc* judgment in *Ute Indian Tribe*, 773 F.2d 1087 (10th Cir.1985), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986), which held that all lands within the original exterior boundary of the Uintah Reservation remain within "Indian country" under the statute.

Nonetheless, according to both *Hagen* and *State of Utah v. Perank*,[87] the Uintah Reservation, though diminished, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use. Though diminished, the Reservation continued to have discrete, identifiable boundaries, or "limits" within the meaning of 18 U.S.C. § 1151(a) (1994). Though diminished, "there was no question but that the land within the diminished reservation retained its status as Indian country." [88]

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[87] 858 P.2d 927, 934 (Utah 1992).

[88] *Chickasaw Nation v. State ex rel. Oklahoma Tax Comm'n*, 31 F.3d 964, 976 n. 8 (10th Cir. 1994), *affirmed in part, reversed in*

The Uintah Reservation boundaries were subsequently enlarged to include areas returned or added through congressional and administrative action. Those reservation lands not "opened" in 1905, together with those areas since restored or added by congressional and administrative action, comprise the current Uintah Reservation. Non-trust or fee lands representing former Indian trust allotments, lands distributed to Mixed-Blood Utes under the Ute Partition Act, or lands exchanged out of trust status by the Tribe located within the boundaries of the Uintah Reservation remain within "Indian country" within the meaning of 18 U.S.C. § 1151(a) (1994), consistent with both *Hagen* and *Ute Indian Tribes*. The State and Local Defendants' assertion that "when lands leave trust status, they no longer fit within any category of 18 U.S.C. § 1151, and so are no longer Indian country," contradicts the express language of 18 U.S.C. § 1151(a) and finds no support in the pertinent case law; under recent Supreme Court decisions, Indian tribal trust lands are embraced "within the limits" of an Indian reservation for purposes of § 1151 (a), and therefore remain within Indian country "notwithstanding the issuance of any patent," *i.e.*, any change in title or ownership.

Sound, well-settled considerations of finality presently bind these parties to the Tenth Circuit's judgment in *Ute Indian Tribe* defining jurisdiction over the "opened" lands. In an opinion for the Court announced four days before this court's initial ruling in this case in 1981, Justice Rehnquist wrote: "This Court has long recognized that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be

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part on other grounds and remanded, —— U.S. ——, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995).

considered forever settled as between the parties.' " [89] The rule of finality " 'is a rule of fundamental and substantial justice, "of public policy and private peace," which should be cordially regarded and enforced by the courts. . . .' " [90]

The mandate of the United States Court of Appeals for the Tenth Circuit in *Ute Indian Tribe v. State of Utah,* received by this court on December 9, 1986, remanded this case to this court "for further proceedings in accordance with the opinion of this Court," referring to the court of appeals' *en banc* ruling reported at 773 F.2d 1087. That mandate remains in full force and effect. As the merits of *Ute Indian Tribe* are no longer *sub judice,* "it is well established that a district court must comply strictly with the mandate rendered by the reviewing court," (*Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America,* 962 F.2d 1528, 1534 (10th Cir.), *cert. denied,* 506 U.S. 956, 113 S.Ct. 414, 121 L.Ed.2d 337 (1992)), and recognizing that even "a new rule cannot reopen the door already closed," [91] this court has no jurisdiction to reconsider the merits of the court of appeals' judgment in light of *Hagen v. Utah,* absent specific direction from the court of appeals that it may do so.

Pursuant to the court of appeals' mandate, conducting "further proceedings in accordance with the opinion" in *Ute Indian Tribe* requires continuing enforcement of the orders previously entered by this court preserving the jurisdictional status quo consistent with that ruling.

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[89] *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 401, 101 S.Ct. 2424, 2429, 69 L.Ed.2d 103 (1981) (quoting *Baldwin v. Traveling Men's Assn.,* 283 U.S. 522, 525, 51 S.Ct. 517, 517-18, 75 L.Ed. 1244 (1931)).

[90] *Id.* (quoting *Hart Steel Co. v. Railroad Supply Co.,* 244 U.S. 294, 299, 37 S.Ct. 506, 507-08, 61 L.Ed. 1148 (1917)).

[91] *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 541, 111 S.Ct. 2439, 2446, 115 L.Ed.2d 481 (1991) (opinion of Souter, J.)

This court further concludes that the continued enforcement of *Ute Indian Tribe*, to the extent that ruling conflicts with the contrary determination in *Hagen v. Utah*, raises a question of public law and the allocation of power among federal, tribal, state and local governments which evades simple resolution, one that is a "controlling question of law" having "general importance." For that reason, this court shall request further instructions from the United States Court of Appeals for the Tenth Circuit concerning how best to proceed in accordance with that court's existing mandate in light of *Hagen v. Utah*.

This court does not reach any question concerning the determination in *Ute Indian Tribe* of the present status of the Uncompahgre Reservation, or of those lands withdrawn from the Uintah Reservation for national forest purposes as there exists no direct conflict between *Ute Indian Tribe* and *Hagen*, *Perank*, or any other reported case concerning those lands. The question of whether Myton, Utah, or other communities in that area constitute "dependent Indian communities" under 18 U.S.C. § 1151(b) (1994), was not addressed in either *Ute Indian Tribe* or *Hagen v. Utah*, and is not ripe for determination on the present record. For that reason, consideration of that question as well as others shall be deferred to a later date.

Afterword

We live in interesting times.

"As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen." *Hagen*, 510 U.S. at 426, 114 S.Ct. at 973 (Blackmun, J., dissenting).[92] From the perspective of 1996, questions of diminishment

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[92] *Accord*, *Ute Indian Tribe*, 521 F.Supp. at 1153 (courts in reservation boundary cases are "called upon to determine the present meaning of statutes under circumstances not imagined by their draftsmen.")

of Indian reservation boundaries necessarily involve some amount of juristic crystal gazing. Those who drafted the Uintah Reservation opening legislation in 1902, 1903, 1904 and 1905 doubtless had no idea whatsoever that the language they chose would be central to the problem of defining federal, state, local, and tribal authority and relationships almost a century later, or that differing readings of those words would precipitate a bitter controversy dividing state and federal courts, a controversy not yet fully resolved in 1996. Yet here we are.

Of course, this matter would largely be resolved had the State of Utah simply chosen to litigate the boundary issue *once*, as its voluntary intervention and joinder at the outset of this action twenty years ago may then have implied. Instead, the State chose to press its Ute boundary diminishment theory in the state criminal cases, and upon prevailing in *Perank* and by extension, in *Hagen* and *Coando*, the State had achieved a circumstance in which the boundary issue was primed for review by the United States Supreme Court.

Likewise, this matter would now be far simpler had the United States Supreme Court afforded the Ute Indian Tribe the opportunity to participate in the *Hagen* appeal as a party. Had the Court done so,[93] the Ute Indian Tribe would undoubtedly have been bound by whatever decision on the merits the Court ultimately made, and the present dilemma would not have arisen. *See also Perank*, 858 P.2d at 953-958 (Zimmerman, J., dissenting).

But life is seldom simple.

All of the parties to this proceeding, together with the court, must somehow arrive at a resoution of the pending

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[93] Motions to intervene for the first time before the Supreme Court are unusual, but not unheard of. *See, e.g., United States Parole Commission v. Geraghty*, 445 U.S. 388, 390, 100 S.Ct. 1202, 1205, 63 L.Ed.2d 479 (1980); *Karcher v. May*, 483 U.S. 1017, 107 S.Ct. 3258, 97 L.Ed.2d 758 (1987) (mem.) (motion for leave to intervene denied).

jurisdictional questions that proves both rational and workable over the long term. For the Tribe, this means adjusting its jurisdictional aspirations to account for the practical effects of the Supreme Court's decisions in *Hagen v. Utah*, whatever the immediate disposition of this proceeding may be. For their part, the State and Local Defendants must now cope with the benefits—and the burdens—of the "more favorable result" obtained in the *Hagen* appeal.[94] The defendants would do well to recognize that "[t]he past cannot always be erased by a new judicial declaration," [95] and that even after *Hagen*, "people living in the area" of the Uintah Reservation includes *both* Indian and non-Indian residents, whose interests, concerns, and expectations deserve thoughtful consideration and most of all, respect.

The happiest peace is that which parties working together can find for themselves.

In light of the foregoing, therefore,

IT IS ORDERED, that this court's previous Order, dated September 2, 1992 (*nunc pro tunc* to August 3, 1992), as modified "to allow the State and Local Defendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Valley Reservation which are not 'Indian Country' as defined by 18 U.S.C. § 1151, *et seq.*" by this court's Order, dated May 2, 1994, is hereby further modified to clarify that for the purposes of the Order, "lands . . . which are not 'Indian Country' " includes those unallotted and unreserved lands of the Uintah Reservation that were opened to entry in 1905, to the extent that those lands were not later restored to tribal ownership or otherwise reincorporated within the Reservation by subsequent congressional and administrative ac-

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[94] "Be careful what you wish for—you might get it." Oscar Wilde (1854-1900).

[95] *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1940).

tion, consistent with *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994); as thus clarified, the Order shall remain in full force and effect pending the disposition of this court's Certification and Request for Instructions from the United States Court of Appeals for the Tenth Circuit, or such further proceedings as may be conducted before that court addressing the questions raised herein, in any event until further order of this court.

IT IS FURTHER ORDERED that the Clerk of this court forthwith shall transmit the accompanying Certificate and Request for Further Instructions, together with three copies of the Certificate and three copies of this Memorandum Opinion and Order, to the Clerk of the United States Court of Appeals for the Tenth Circuit.

CERTIFICATE AND REQUEST FOR FURTHER INSTRUCTIONS

TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT:

The above-captioned proceeding last came before the United States Court of Appeals for the Tenth Circuit on rehearing *en banc* and was decided on September 17, 1985. *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir.1985). Following that ruling, the United States Supreme Court denied certiorari. *State of Utah v. Ute Indian Tribe*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). The court of appeals issued its Judgment pursuant to the *en banc* ruling, dated September 17, 1985, which together with the *en banc* opinion was received as the court of appeals' mandate pursuant to Fed.R.App.P. 41(a) and docketed by the Clerk of this court on December 8, 1986.

In its *en banc* ruling, the court of appeals held that the Uintah Valley Reservation, created by Executive Order in 1861 [1] and confirmed by Act of Congress in 1964, [2] had not been diminished by congressional legislation enacted from 1902 through 1905 opening unallotted and unreserved lands on the Reservation to entry under the homestead and townsite laws,[3] or by the inclusion of portions of the Reservation among lands withdrawn as national forest lands by Act of Congress and Presidential Procla-

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[1] Executive Order 38-1 (reprinted in 1 Charles Kappler, *Indian Affairs: Laws and Treaties* 900 (1904)).

[2] Act of May 5, 1864, ch. 77, 13 Stat. 63.

[3] *See* Act of May 27, 1902, ch. 888, 32 Stat. 263; J.Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902); Act of March 3, 1903, ch. 994, 32 Stat. 998; Act of April 21, 1904, ch. 1402, 33 Stat. 207; Act of March 3, 1905, ch. 1479, 33 Stat. 1069. (The complete text of this legislation is reprinted in Appendix A to this court's initial memorandum opinion. *See Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072, 1167-1174 (D.Utah 1981).)

mation in 1905.[4] 773 F.2d at 1088-1090; *see also id.* at 1099-1100 (Seymour, Holloway, McKay & Logan, JJ., concurring).

According to the United States Supreme Court's decision in *Hagen v. Utah,* 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), the 1902-1905 Acts "opening" the Uintah Reservation to non-Indian entry and settlement operated to restore the unallotted and unreserved lands of that Reservation to the public domain. In doing so, the 1902-1905 Acts *diminished*—that is, reduced or curtailed—the boundaries of the Reservation to the extent of the lands thus "opened." Insofar as these "opened" lands were not later returned to tribal ownership and jurisdiction by subsequent congressional and administrative action, they ceased to have reservation status in 1905 and are no longer found within "Indian country" within the meaning of 18 U.S.C. § 1151 (1994). To that extent, *Hagen* stands in direct conflict with the court of appeals' *en banc* judgment in *Ute Indian Tribe,* 773 F.2d 1087 (10th Cir.1985), *cert. denied,* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1996), which held that all lands within the original exterior boundary of the Uintah Reservation remain within "Indian country" under the statute.

In *United States v. Cuch,* 79 F.3d 987 (10th Cir.1996), the court of appeals described the effect of *Hagen* in these terms: "[t]he *Hagen* decision effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, redefined the Reservation boundaries resulting from our earlier decision, and conclusively settled the question." *Cuch,* at 989. Nevertheless, consistent with principles of finality, the court of appeals held that *Hagen* is not available as a ground for collateral review of federal criminal convictions which became final prior to the *Hagen* decision.

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[4] *See* Act of March 3, 1905, ch. 1479, 33 Stat. 1069; Proclamation of July 14, 1905, 34 Stat. 3116 (reprinted in 3 Charles Kappler, *Indian Affairs: Laws and Treaties* 602-605 (1913)).

The court of appeals' final Judgment in the above-captioned proceeding remains in place, having never been recalled or otherwise withdrawn. Motions are now pending before this Court concerning the appropriateness of injunctive relief designed to enforce the terms of the court of appeals' Judgment, notwithstanding the Supreme Court's determination in *Hagen*. (A copy of this court's Memorandum Opinion and Order addressing the issues raised by those motions and the grounds for this Certificate and Request for Further Instruction is provided herewith.)

These circumstances present a problem of sound relationships within the judicial hierarchy, and raise a question concerning enforcement of the court of appeals' Judgment with respect to these parties that evades simple resolution. As a controlling question of public law and the allocation of power among governments, it appears to be of such "general importance" that it should be resolved by the United States Court of Appeals for the Tenth Circuit. This court's analysis of the "mandate rule" component of the doctrine of "law of the case," set forth in detail in this court's accompanying Memorandum Opinion and Order, convinces this court that "a lower court must seek permission from an appellate court before departing from the mandate on the ground that intervening changes in the law require re-examination of issues actually decided," (18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478, at 793 (1981), and this court's request for further instructions is expressly made with that understanding. Cf. *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 962 F.2d 1528, 1533-1535 & n. 3 (10th Cir.) ("The rule is well established that a district court must comply strictly with the mandate rendered by the reviewing court."), *cert. denied*, 506 U.S. 956, 113 S.Ct. 414, 121 L.Ed.2d 337 (1992).

Therefore,

In light of the identified area of conflict between the court of appeals' Judgment in *Ute Indian Tribe* and the Supreme Court's decision in the *Hagen* case, and the practical consequences which flow from that conflict, this court hereby requests further instructions from the court of appeals concerning the proper conduct of "further proceedings in accordance with the opinion of this Court" as set forth in the Judgment dated September 17, 1985 and received by this court on December 9, 1986.

Further instructions on this question would clearly be helpful, and would certainly be welcomed. If it so chooses, the court of appeals may construe this court's request for instructions as an invitation to recall its own mandate for futher consideration. *See Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir. 1987); *cf. Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1536 n. 4 (10th Cir.1995) (Indian tribe "filed a motion pursuant to Fed. R.App.P. 27 asking [the court of appeals] to partially recall its earlier mandate" concerning reservation diminishment issue).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-4073

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,
Plaintiff-Appellee,

v.

STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; DUCHESNE CITY, a municipal corporation; UINTAH COUNTY, a political subdivision of the State of Utah,
Defendants-Appellants,

and

UNITED STATES OF AMERICA,
Amicus Curiae.

ORDER

Filed July 1, 1997

Before TACHA, GODBOLD* and HOLLOWAY, Circuit Judges.

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* The Honorable John C. Godbold, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

Appellants' petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER
Clerk of Court

by: /s/ [Illegible]
Deputy Clerk

APPENDIX D

STATUTORY PROVISIONS

Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-264, I Kapp. 750, 753 (2d ed. 1904), LD 82:

That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided,* That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further,* That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to

said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

Said item of seventy thousand and sixty-four dollars and forty-eight cents to be paid to the Uintah and White River Utes covers claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and for which the Government has received from said Uncompahgre Indians money aggregating sixty thousand and sixty-four dollars and forty-eight cents; and the remaining ten thousand dollars claimed by the Indians under an Act of Congress detaching a small part of the reservation on the east and under which Act the proceeds of the sale of the lands were to be applied for the benefit of the Indians.

* * * *

Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-1070, III Kapp. 124, 146-147 (1913), LD 105:

That so much of the act of March third, nineteen hundred and three, as provides that the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.

That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *And provided further,* That all lands opened to settlement and entry under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the act

of Congress of May twenty-seventh, nineteen hundred and two, and the acts amendatory thereof and supplemental thereto.

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided,* That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.[1]

That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in the office of the Secretary of the Interior, in the city of Washington, said description and a map showing the locations made by it on the Uintah Reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two (Statutes at Large, volume thirty-two, page two hundred and sixty-three); and thereupon the Secretary of the Interior shall forthwith cause said locations to be inspected and report made, and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each

of said claims: *Provided further,* That the Florence Mining Company entitled under the act of Congress approved May twenty-seventh, nineteen hundred and two, to the preferential right to locate not to exceed six hundred and forty acres of contiguous mineral land in the Uintah Reservation, Utah, shall within sixty days from the passage of this act file in the office of the recorder of deeds of the county in which its location is made a proper description of its claim, and it shall within the same time file in the office of the Secretary of the Interior said description and a map showing the location made by it on the Uintah Reservation, Utah, and thereupon the Secretary of the Interior shall forthwith cause said location to be inspected and report thereon made, and if found not to exceed six hundred and forty acres he shall issue a patent in fee to said company for the said land: *And provided further,* That the extension of time for opening the unallotted lands to public entry herein granted shall not extend the time to make locations to any person or company heretofore given a preferential right, but the Raven Mining Company and the Florence Mining Company pending the time for opening to public entry the Uintah Reservation shall have the right of ingress and egress to and from their respective properties over and through said reservation.

* * * *

(2)

No. 97-0570

Supreme Court, U.S.
F I L E D
OCT 31 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

DUCHESNE COUNTY, UTAH
and
UINTAH COUNTY, UTAH,

Petitioners,

vs.

THE UTE INDIAN TRIBE
OF THE UINTAH AND OURAY RESERVATION

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF *CERTIORARI*

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3798

QUESTIONS PRESENTED

As phrased by the petitioners, the "questions presented" are convoluted and difficult (if not impossible) to comprehend. For purposes of clarity, the respondent suggests that those questions be rephrased as follows:

1. Did the United States Court of Appeals for the Tenth Circuit err when it refused to expand this Court's decision in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) to remove, from "Indian country" status, those lands on the Uintah Valley Reservation that were never restored to the public domain and were never opened to non-Indian settlement, but which have passed from trust into fee status under Congressional Acts *other* than those examined by this Court in *Hagen*.

2. Did the United States Court of Appeals for the Tenth Circuit err when it refused to reconsider its final decision in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986) insofar as that decision addressed the "Indian country" status of lands that were not addressed by this Court in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) or by the Utah Supreme Court in *State v. Perank*, 858 P.2d 927 (1992).

PARTIES TO THE PROCEEDINGS

The petition accurately lists the parties to the proceedings. As noted in the petition, the State of Utah and the Cities of Roosevelt and Duchesne, each of which is a municipal corporation, were defendants in the proceedings below.

Although the Tenth Circuit's decision in *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), affects the State of Utah as much as, or more than, Duchesne and Uintah Counties, the State has not petitioned this Court, nor has it joined in the Counties' petition, for a writ of *certiorari* to review the Tenth Circuit's decision.

Similarly, neither the City of Roosevelt nor the City of Duchesne has petitioned this Court, or joined in the Counties' petition, for a writ of *certiorari* to review the Tenth Circuit's most recent decision in *Ute Indian Tribe v. Utah.*

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STATEMENT OF THE CASE

The Uintah and Ouray Indian Reservation consists of two separate but contiguous tracts of land set aside in the nineteenth century for the use and occupancy of the ancestors of the people who comprise the present-day Ute Indian Tribe.[1]

The Uintah Valley Reservation

On October 3, 1861, President Lincoln established the Uintah Valley Reservation along a river in the Territory of Utah then known as the Uinta, but now referred to as the Duchesne. *See* Executive Order No. 38-1, *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 900 (2d ed. 1904). Congress confirmed the President's action in 1864, providing that the land in question was "set apart for the permanent and exclusive occupation of such of the different tribes of Indians of the [Utah] territory as may be induced to inhabit the same." Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63. Between 1866 and 1878, the members of the Uintah Band of Ute Indians (who were indigenous to what is now known as the "Wasatch Front" in the State of Utah) gradually moved onto the Uintah Valley Reservation and made it their permanent home. *See* O'Neil, *The Reluctant Suzerainty: the Uintah and Ouray Reservation,* 39 Utah Historical Quarterly 129, 131 (Spring 1971).

During the same time that the Uintah Utes were

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[1] In 1938, under the authority of the Indian Reorganization Act, Act of June 18, 1934, ch. 576, 48 Stat. 984, *codified at* 25 U.S.C. §§ 461-479, three formerly autonomous bands of Ute Indians (the Uintahs, Uncompahgres and Whiterivers) united under a single constitution to form the Ute Indian Tribe. *See* Preamble, Constitution of the Ute Indian Tribe of the Uintah and Ouray Indian Reservation.

removing to the Uintah Valley Reservation, the Utes in Colorado were facing pressure of "firestorm proportions", *see Ute Indian Tribe v. Utah*, 521 F.Supp. 1072, 1096 (D. Utah 1975), *aff'd in relevant part*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), to abandon their large reservation, which had been created by the Treaty of March 2, 1868, 15 Stat. 619, II Kapp. 990 (2d ed. 1904). Ultimately, title to the Yamparka (now Whiteriver) Utes' vast reservation in western Colorado was extinguished and the 700 band members were moved at gunpoint to the Uintah Valley Reservation in 1880, after 20 members of the band participated in an attack on Indian agent Nathan Meeker and his family. *Id.* at 1097 & n.72. The government also secured the consent of the Tabeguache (now Uncompahgre) Utes (who inhabited the central portion of the Ute Reservation in Colorado) to a removal agreement that was signed on March 6, 1880, and was ratified by Congress on June 15, 1880. *See* Act of June 15, 1880, 21 Stat. 199.

The Uncompahgre Reservation

Originally, the government planned to resettle the Uncompahgre Utes near the present location of Grand Junction, Colorado. Instead, a federal commission selected a large rectangular area of uninhabited and largely uninhabitable land in eastern Utah bordering on Colorado's western boundary as the Uncompahgres' new home. *See* Report of the Commissioner of Indian Affairs, 1881, at 37. By an Executive Order dated January 5, 1882, President Arthur formally established those lands as an Indian reservation for the use and occupancy of the Uncompahgre Utes. *See* I Charles Kappler, *Indian Affairs: Laws and Treaties* 901 (2d ed. 1904).

Before the end of the nineteenth century, the Uintah Valley and Uncompahgre Reservations - like many others -

became the subject of the "familiar forces" brought to bear by "the desire of non-Indians to settle upon Reservation lands." *See DeCoteau v. District County Court*, 420 U.S. 425, 431-32, 95 S.Ct. 1082, 1086, 43 L.Ed.2d 300 (1975). Those forces led to the passage in 1887 of the General Allotment Act, which granted the President the authority "to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of those sales being dedicated to the Indians' benefit." *See DeCoteau, supra,* 420 U.S. at 432, 95 S.Ct. at 1987 (citing Act of Feb. 8, 1887, ch. 119, 24 Stat. 388).

Opening of the Uintah Valley Reservation

Several bills were introduced during the last decade of the nineteenth century to allot the Uintah Valley Reservation and open the unallotted lands to non-Indian settlement. *See Hagen v. Utah*, 510 U.S. 399, 402, 114 S.Ct. 958, 961, 127 L.Ed.2d 252 (1994). In part because the Uintah and Whiteriver Utes steadfastly refused to surrender any portion of their Reservation, allotment did not occur until the present century. *Id.*

In 1902, Congress passed an Act providing that, if a majority of the adult male members of the Uintah and Whiteriver bands consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Valley Reservation. The 1902 Act also provided that, when the October 1, 1903, deadline for allotments passed, "all the unallotted lands within said reservation shall be restored to the public domain". 32 Stat. 263.

The allotments did not proceed as provided for by the 1902 Act and measures extending the time for opening the Uintah Valley Reservation were enacted in 1903 and 1904. *See* Act of Mar. 3, 1903, ch. 994, § 1, 32 Stat. 997-98; Act of Apr. 21, 1904, ch. 1402, § 1, 33 Stat. 207-08. By the Act

of Mar. 3, 1905, ch. 1479, 33 Stat. 1048 (hereafter, "the 1905 Act"), Congress again deferred the time for opening the unallotted lands on the Uintah Valley Reservation to public entry, this time to September 1, 1905. Section 1, 33 Stat. 1069. The 1905 Act then specified "the manner of opening such lands for settlement and entry, and for disposing of the same." *Ibid.* Specifically, the 1905 Act provided that the unallotted lands "shall be disposed of under the general provisions of the homestead and townsite laws of the United States." *Ibid.*[2]

Although the government failed to obtain the consent of the Uintah and Whiteriver Utes to the allotment of their lands and opening of the unallotted lands to non-Indian settlement,[3] President Theodore Roosevelt issued a Proclamation on July 14, 1905, which declared that "the unallotted lands in [the Uintah Valley] Reservation * * * will on and after the 28th day of August, 1905 * * * be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States." 34 Stat. 3120.

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[2] In addition to extending the time of entry under the 1902 Act and describing the entry process, the 1905 Act authorized the President to "set apart and reserve" lands in the Reservation as a forest reserve prior to opening the unallotted lands to settlement. 33 Stat. 1070. Pursuant to this authority, on July 14, 1905, President Theodore Roosevelt issued a proclamation designating some 1,010,000 acres within the Uintah Valley Reservation as an addition to the Uintah National Forest Reserve. Proclamation of July 14, 1905, 34 Stat. 3113, 3116.

[3] Only 82 of the 280 adult male Utes who were eligible to vote consented to the allotment plan. *See* H.R. Doc. No. 33, 85th Cong., 1st Sess. 5 (1903).

Opening of the Uncompahgre Reservation

Allotment of the barren Uncompahgre Reservation proceeded at a much more rapid pace than allotment and opening of the comparatively more fertile Uintah Valley Reservation. Three bills were introduced in 1894 providing "for opening the Uncompahgre . . . reservation[]". *See* H.R. 4511, 6557; S.Rep.No. 450, 53d Cong., 2d Sess. 4027 (1894). Although these bills were not enacted, the Indian Appropriations Act for the year included H.R. 6557 which directed a presidential commission to allot the Uncompahgre reservation and to open the unallotted lands "to entry under the homestead and mineral laws of the United States." In large part because there were insufficient agricultural lands available on the Uncompahgre Reservation to comply with the Act, the presidential commission's attempts to carry out the 1894 Act failed. *See* H.R. Doc. No. 191, 54th Cong., 1st Sess. (1896); S. Doc. No. 161, 54th Cong., 1st Sess (1896).

Congress addressed the lack of sufficient agricultural lands on the Uncompahgre Reservation in the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87, I Kapp. 621 (2d ed. 1904). In that Act, Congress directed the Secretary of the Interior to allot agricultural lands on "the Uncompahgre and the Uintah Reservation or elsewhere in [Utah]" to the Uncompahgres. *Id.* Congress further directed that the unallotted lands on the Uncompahgre Reservation "be open for location and entry under all the lands laws of the United States" beginning on April 1, 1898. *Ibid.* Eventually, by separate statute, Congress confirmed 83 allotments that were made within the Uncompahgre Reservation. *see* Act of Mar. 1, 1899, ch. 324, 30 Stat. 924, 940-41, I Kapp. 686 (2d ed. 1904). An additional 584 Uncompahgre allotments, made on the Uintah Valley Reservation, were approved in 1905. *See* Report of the Commissioner of Indian Affairs, 1905, at 146.

Ute Indian Tribe I, II and III

In 1975, the Ute Indian Tribe filed a declaratory judgment action in the Federal District Court for the District of Utah. Parties to the proceedings included the Ute Indian Tribe, as plaintiff; the State of Utah as defendant-intervenor; the Counties of Duchesne and Uintah; and the Cities of Roosevelt and Duchesne. *See Ute Indian Tribe v. Utah*, 521 F.Supp. 1072 (D. Utah 1981), *aff'd in relevant part*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied* 479 U.S. 994 (1986) (*"Ute Indian Tribe I"*).

The issues litigated in *Ute Indian Tribe I* were (1) whether, by various statutes, Congress intended to diminish the Uintah Valley or Uncompahgre Reservations when those reservations were opened to non-Indian settlement, and (2) the geographic scope of the Tribe's jurisdiction within the original boundaries of the Reservation. 521 F.Supp. at 1075. The district court held that the Uncompahgre Reservation had been disestablished, but that the Uintah Valley Reservation, including the national forest lands, remained largely intact. *See* 521 F.Supp 1072. The Tribe and the State filed cross appeals of the District Court's decision to the United States Court of Appeals for the Tenth Circuit.

On appeal, a two-judge majority of a panel of the Tenth Circuit affirmed in part and reversed in part the district court's findings in *Ute Indian Tribe I*, ruling that the Uintah Valley Reservation had been diminished substantially by the removal, from the Reservation, of lands that had been restored to the public domain in 1905. *See Ute Indian Tribe v. Utah*, 716 F.2d 1298 (10th Cir. 1983) ("*Ute Indian Tribe II*"). However, on rehearing in light of this Court's intervening decision in *Solem v. Bartlett*, 465 U.S. 473 (1984), a majority of the Tenth Circuit, sitting *en banc*, ruled that neither the Uintah Valley nor the Uncompahgre Reservations had been diminished, except for two parcels

whose status was not subsequently litigated. *See* 773 F.2d 1087 (10th Cir. 1985) (*en banc*) ("*Ute Indian Tribe III*"). The defendants sought review by this Court, but the writ of *certiorari* was denied on December 1, 1996. *See Utah v. Ute Indian Tribe*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). Following this Court's denial of the petition for writ of *certiorari*, the Tenth Circuit issued its mandate in *Ute Indian Tribe III* on December 9, 1986.

Unhappy with this Court's refusal to review the Tenth Circuit's decision, Duchesne County, proceeding under the name of "the State", raised the boundary issue in the courts of the State of Utah.

State v. Hagen

In 1988, the County of Duchesne filed an information against Robert P. Hagen, charging him with distribution of a controlled substance (i.e., marijuana) for value, a third-degree felony. The alleged offense took place on fee lands in Myton, Utah, a community that is located within the original exterior boundaries of the Uintah Valley Reservation and which has a substantial Native American population. Hagen entered a plea of guilty, but subsequently filed a motion to arrest judgment and withdraw his plea, on the grounds that he was Indian and the alleged offense took place in "Indian country".[4]

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[4] "Indian country" includes "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151.

Following an evidentiary hearing, the trial court denied Hagen's motion to arrest judgment and withdraw his plea. The court determined that Hagen was not an Indian for purposes of criminal prosecution because he was not a member of a federally recognized Indian tribe. The court expressly declined to address the issue of whether the locus of the crime was within "Indian country."

On appeal, the Utah Court of Appeals ruled that the trial court had applied the improper standard and burden of proof by requiring Hagen to establish, by clear and convincing evidence, that he was Indian. *State v. Hagen*, 802 P.2d 745 (Utah App. 1990), *rev'd on other grounds*, 858 P.2d 925 (Utah 1992). For that reason alone, the Utah Court of Appeals reversed Hagen's conviction. *Id.* at 747.[5]

The Utah Supreme Court declined to address Hagen's

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[5] Indeed, until it reached the Utah Supreme Court, the only issues litigated in *Hagen* were whether Robert Hagen, whose only affiliation with an Indian tribe is with a Tribe that is not federally recognized, was an Indian for criminal jurisdiction purposes and whether the trial court had applied the proper standard and allocation of the burden of proof in determining that he was *not* Indian. In declining the State's suggestion that it defer ruling in the *Hagen* case pending the Utah Supreme Court's resolution of the boundary issue in *State v. Perank* (discussed below), the Utah Court of Appeals stated:

> [t]he Tenth Circuit's decision does not appear to hold open any role for the state courts in refining its holding in *Ute Indian Tribe [III]* . . . [W]e are hard pressed to see how, given the Supremacy Clause and the doctrine of collateral estoppel, our state courts could reach a contrary decision [on the Reservation boundary issue] that would have any practical effect.

802 P.2d at 747. The State appealed this *dicta* to the Utah Supreme Court, raising the Reservation boundary issue for the first time in the *Hagen* case.

status as an Indian. Instead, on the basis of its decision in *State v. Perank*, 858 P.2d 927 (Utah 1992), entered on the same date, the court summarily ruled that the State had properly prosecuted Robert Hagen because the offense with which he was charged had been committed outside of "Indian country". *See State v. Hagen*, 858 P.2d 925 (1992).

State v. Perank

State v. Perank arose in 1983 at a time when the Tenth Circuit's panel decision in *Ute Indian Tribe II* (finding that the Uintah Valley Reservation had been diminished by the exclusion, from "Indian country" status, of lands that had been restored to the public domain under the 1902-1905 Acts) was the governing law. Clint Perank entered a guilty plea to a charge of third-degree burglary in Myton, Utah. At the time, Perank was not enrolled, nor was he eligible for enrollment, in the Ute Indian Tribe, the only tribe with which he claimed any affiliation.

Perank's sentence on the burglary offense was commuted to probation. At a revocation-of-probation hearing in 1986, after the Tenth Circuit, sitting *en banc*, had reversed *Ute Indian Tribe II*, concluding that all lands within the original boundaries of the Uintah Valley Reservation remained "Indian country", *see Ute Indian Tribe III*, Perank asserted for the first time that the State lacked jurisdiction to prosecute him for his probation violation or the underlying burglary offense, arguing that he was Indian and the crime had been committed within "Indian country".

As stated by Justice Stewart:

> [t]he only issue [decided by the Utah Supreme Court in *Perank*] is whether the unallotted and unreserved lands that were opened to entry in 1905 . . . are within the present boundaries of the [Uintah

Valley] Reservation.

State v. Perank, 858 P.2d 927, 934 (Utah 1992). After examining the 1902-1905 Acts, the Utah Supreme Court

> conclude[d] that operative statutory language that restores reservation land to the public domain is persuasive evidence of congressional intent *to diminish the reservation as to the lands so restored.*

State v. Perank, *supra*, 858 P.2d at 940. (emphasis added). *See also* 858 P.2d at 952 ("we hold that the unallotted, unreserved lands of the Uintah Reservation were restored to the public domain by the [1902-1905 Acts] and that the Reservation boundaries were *diminished by that restoration.*") (emphasis added).

In making its ruling in *Perank*, the Utah Supreme Court observed "that all parties agree that the Uintah Reservation . . . continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use." 858 P.2d at 934. The court also expressly disavowed any intention to determine the "Indian country" status of lands on the Uintah Valley Reservation that had been withdrawn as a forest reserve or of the Uncompahgre Reservation. *See* 858 P.2d at 934 ("The legal status of the [Ashley and Uintah National Forests] is not at issue here, nor is the legal status of the Uncompahgre Reservation . . . ").

Hagen v. Utah

In 1994, this Court granted a petition for writ of *certiorari* "to resolve the direct conflict between the[] decisions of the Tenth Circuit and the Utah Supreme Court on the question whether the Uintah Reservation has been diminished." *Hagen v. Utah*, 510 U.S. 399, 409, 114 S.Ct.

958, 964, 127 L.Ed.2d 252 (1994). After examining the 1902-1905 Acts by which the unallotted lands on the Uintah Valley Reservation were opened to non-Indian settlement, this Court affirmed the limited ruling of the Utah Supreme Court, stating:

> the restoration of unallotted reservation lands to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act *diminished* the reservation.

510 U.S. at 414, 114 S.Ct. at 967 (emphasis added).[6]

Ute Indian Tribe IV

Following issuance of this Court's decision in *Hagen v. Utah*, the State of Utah, joined by the petitioner Counties, asked the United States District Court for the District of Utah to dissolve a preliminary injunction that it had issued on September 2, 1992, *nunc pro tunc* August 2, 1992, in the renewed *Ute Indian Tribe* litigation.[7] In support of their

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[6] Without explanation, neither this Court in *Hagen* nor the Utah Supreme Court in *Perank* considered whether Myton, Utah, which has a substantial Native American population, might be "Indian country" under 18 U.S.C. § 1151(c) as being a "dependent Indian community"

[7] The preliminary injunction prohibited the State and its political subdivisions from interfering in the Tribe's exercise of governmental authority within the boundaries of the Uintah and Ouray Reservation, as those boundaries had been confirmed by the Tenth Circuit's decision in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (1985), *cert. denied*, 479 U.S.

(continued...)

motion, and notwithstanding the express language used by this Court and the Utah Supreme Court, the State and Counties argued that *Hagen* effected a termination of the Uintah Valley Reservation, with the affect that all lands on the Reservation lost their "Indian country" status when they passed from trust to fee status. The Tribe, supported by the United States, asserted that in *Hagen* this Court had merely found that the Uintah Valley Reservation had been diminished by the exclusion therefrom of those lands that were opened to non-Indian settlement under the 1902-1905 Acts, and which had not been subsequently restored to tribal ownership by congressional and administrative action.[8] Observing that this Court had concluded only that the Uintah Valley Reservation had been diminished, the Tribe asserted

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[7](...continued)
994 (1986), pending the conclusion of this Court's disposition of Robert Hagen's petition for a writ of *certiorari* and the conclusion in the district court of the Ute Indian Tribe's motion for a permanent injunction preventing the *Ute Indian Tribe* defendants from enforcing the Utah Supreme Court's decision in *Perank*. The district court's injunction was modified once "to allow the State and Local Defendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Valley Reservation which are not 'Indian Country', as defined by 18 U.S.C. § 1151". Order, *Ute Indian Tribe v. Utah*, unpublished, (D. Utah May 2, 1994).

[8] At various times, pursuant mainly to the provisions of the Indian Reorganization Act of 1934, the Secretary of the Interior has restored to tribal ownership all of the unallotted acreage within the Uintah Valley Reservation that remained unentered. *See* Order of Restoration, 10 Fed. Reg. 12409 (Aug. 25, 1945); Public Land Order No. 2713, 18 Fed. Reg. 426 (Jan. 20, 1953); Public Land Order No. 1310, 21 Fed. Reg. 5015 (July 5, 1956); Public Land Order No. 2002, 24 Fed. Reg. 8175 (Oct. 8, 1959); Public Land Order No. 2269, 26 Fed. Reg. 1718 (Feb. 28, 1961). Each of the tracts of land addressed in these Public Land Orders was expressly "added to and made a part of the existing [Uintah and Ouray] reservation." *Id.*

that all fee lands *except* those opened to settlement under the 1902-1905 Acts remained "Indian country".[9]

In deciding whether to grant the defendants' motion, the district court examined the conflicts between this Court's judgment in *Hagen,* the Utah Supreme Court's decision in *Perank*, and the Tenth Circuit's judgment in *Ute Indian Tribe III* and concluded that

> *Hagen* . . . effectively determined that the Uintah Reservation was *diminished* to the extent of the unallotted and unreserved lands that were opened to entry in 1905. To the extent that those lands were not later restored to tribal ownership and jurisdiction by subsequent congressional and administrative action, they ceased to have reservation status in 1905 and are no longer found within "Indian country" within the meaning of 18 U.S.C. § 1151. *To that extent, Hagen stands in direct conflict with the Tenth Circuit's en banc ruling in Ute Indian Tribe. . ..* At the same time, the Uintah Reservation, as an entity, continued

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[9] As discussed below, there are four categories of fee land on the Uintah Valley Reservation: (1) lands opened to settlement under the 1902-1905 Acts: (2) allotments that were made to individual Indians in 1905 that have since passed into fee status; (3) lands that were held in trust in 1905, but that passed into fee status in 1956 under the terms of the Ute Termination and Supervision Act, Act of Aug. 27, 1954, Pub. L. No. 97-678, ch. 1009, 68 Stat. 868, *codified at* 25 U.S.C. §§ 677-677aa; and (4) lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status by the Tribe for then-fee (now trust) lands under the terms of the Indian Land Consolidation Act of 1983, Pub. L. No. 47-459, 96 Stat. 2517, *codified at* 25 U.S.C. §§ 2201-11. In *Hagen*, only the first category was considered by this Court, and was determined to be outside of "Indian country". *See* 510 U.S. at 414, 114 S.Ct. at 967. It is the status of the latter three categories that the petitioners seek to put at issue in these proceedings.

> to exist after 1905 as to allotted and reserved lands not "opened" and as to lands later restored to the reservation by Congress or the Department of the Interior. . .

935 F.Supp. 1473, 1497 (D. Utah 1996) (emphasis added). The district court then undertook a detailed examination of the statutes by which the three disputed categories of fee land on the Uintah Valley Reservation that were *not* examined in *Hagen* or *Perank* passed from trust to fee status. *See* 935 F.Supp. at 1496-1505. The district court concluded that *none* of the statutes under which the status of the disputed categories of fee lands was changed expressed a Congressional intent to remove the affected lands from "Indian country". *See id.*

To the limited extent that it found that *Hagen* did directly conflict with *Ute Indian Tribe III*, the district court modified its injunction. Under the modified injunction, the State of Utah and petitioner Counties are authorized to prosecute felony crimes occurring on lands which are not "Indian Country" [including] those unallotted and unreserved lands of the Uintah Reservation that were opened to entry in 1905 . . . ". 935 F.Supp. at 1531.

Ute Indian Tribe V

The Court of Appeals concurred with the District Court's application of this Court's ruling in *Hagen:*

> we agree with the district court that *Hagen* did not effectively overrule the entire judgment in *Ute Indian Tribe III*, including our holdings concerning the National Forest Lands and the Uncompahgre Reservation. Further, we agree that *Hagen's* only effect was to reduce (and

> not terminate) the boundaries of the Uintah Valley Reservation. . ..

Ute Indian Tribe v. Utah, 114 F.3d 1513, 1528 (10th Cir. 1997) ("*Ute Indian Tribe V*"). Accordingly, the Tenth Circuit declined to withdraw its earlier mandate and, instead, modified its mandate to exclude from "Indian country" those "lands within the original [Uintah Valley] reservation boundaries [that were] unallotted, opened to non-Indian settlement under the 1902-1905 legislation, and not thereafter returned to tribal ownership." *Id.*

In so ruling, the Tenth Circuit explicitly stated:

> our decision to modify *Ute Indian Tribe III* does not result from the desire to correct a prior erroneous judgment, but rather from the need to reconcile our decision with a directly conflicting decision of the Supreme Court.

Id. at 1529.

In their petition for a writ of *certiorari*, the Counties ask this Court to expand this Court's judgment in *Hagen* and completely overrule the Tenth Circuit's 1985 judgment in *Ute Indian Tribe III*.

REASONS WHY THIS COURT SHOULD DENY THE PETITION FOR WRIT OF *CERTIORARI*

The crux of the dispute presented to this Court in the petition for a writ of *certiorari* is whether the petitioners should be permitted to expand this Court's decision in *Hagen v. Utah* to exclude from the Uintah Valley Reservation lands that passed from trust to fee status under Acts *other* than those considered by this Court in *Hagen*. Specifically at issue is whether

1. lands that were allotted to individual Indians in 1905 and that since have passed into fee status under the General Allotment Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388;

2. lands that were held in trust after 1905 but were later apportioned to the "Mixed-Blood" Utes under the Ute Termination and Supervision Act, Act of Aug. 27, 1954, Pub.L. No. 97-678, ch. 1009, 68 Stat. 868, *codified at* 25 U.S.C. §§ 677-677aa; and

3. lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status by the Ute Indian Tribe for then-fee (now trust) lands in an effort to consolidate the Tribe's land holdings under the Indian Land Consolidation Act of 1983, Pub.L. No. 47-459, 96 Stat. 2517, *codified at* 25 U.S.C. §§ 2201-11

remain "Indian country" as being "lands within the limits of an Indian reservation" under 18 U.S.C. § 1151(a).

In *Ute Indian Tribe V*, the Tenth Circuit affirmed the district court's detailed analysis of the statutes that concern each of these three categories of land and its conclusion that *none* of the statutes expresses a congressional intent to remove the various categories of land from the Uintah Valley Reservation. *See* 114 F.3d at 1528. Accordingly, the Tenth Circuit ruled that the lands embraced within each category remain "Indian country".

Throughout their petition for a writ of *certiorari*, the petitioners suggest that *Ute Indian Tribe V* conflicts with this Court's decision in *Hagen v. Utah*, *see* Petition for Writ of *Certiorari* at 14-20 [hereafter, "Pet. Br. at __"] and the Utah

Supreme Court's decision in *State v. Perank*. *See* Pet. Br. at 21-29. However, a reading of the relevant decisions demonstrates that the alleged conflicts simply do not exist. Moreover, the petitioners ultimately admit that they do not meet this Court's criteria for being granted a petition for writ of *certiorari*. *See* Pet. Br. at 30. Thus, in desperation, they appeal to this Court for "some type of appropriate relief." *Id.*

For the reasons discussed below, this Court should deny the petition for a writ of *certiorari* and should also deny the petitioners' request for "some [unspecified] type of . . . relief."

I. *Ute Indian Tribe V* Is in Accord With This Court's Previous Reservation-Diminishment Decisions, Including *Hagen v. Utah*.

The petitioners assert that this Court should grant the petition for writ of *certiorari* for the reason that the Tenth Circuit's decision in *Ute Indian Tribe V* conflicts with this Court's decision in *Hagen v. Utah*. In making this argument, the petitioners misapprehend this Court's previous reservation-diminishment decisions, generally, and this Court's decision in *Hagen*, specifically.

A. *Ute Indian Tribe V* Correctly Recognizes That This Court Found that the Uintah Valley Reservation Continues to Exist, Albeit Diminished in Size.

The petitioners suggest that the Tenth Circuit erred when it failed to recognize that, when this Court characterized the Uintah Valley Reservation as being "diminished" after 1905, it, in fact, meant that the Reservation had been "terminated." *See* Pet. Br. at 14-20. The petitioners' argument attributes a lack of grammatical

precision to this Court that is unwarranted.

In *Hagen v. Utah*, this Court ruled that:

> the restoration of unallotted reservation lands to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act *diminished* the reservation.

Hagen v. Utah, 510 U.S. at 414, 114 S.Ct. at 967 (emphasis added). In analyzing this language, the Tenth Circuit found that this Court

> did not decide that the 1902-1905 allotment legislation completely disestablished the Uintah Valley Reservation, erasing its outer boundaries and rendering [25 U.S.C.] § 1151(a) inapplicable to the three disputed categories of [fee] lands.

Ute Indian Tribe V, 114 F.3d at 1530. Instead, the Tenth Circuit found that:

> [t]he Court stated that the Uintah Valley Reservation had been 'diminished' - not 'disestablished,' 'eliminated,' or 'terminated.' Moreover, the diminishment was only 'with respect to those lands' that had been restored to the public domain under the 1902-1905 legislation.

Id. On that basis, the Tenth Circuit concluded that "*Hagen* did not erase the boundaries of the Uintah Valley Reservation". Based upon the district court's analysis of the statutes by which the three disputed categories of fee land

passed into non-trust status, the Tenth Circuit further determined that "the current 'limits of [the] reservation' . . . embrace the three categories of non-trust lands at issue." *Ibid.* The Tenth Circuit's determinations are entirely consistent with this Court's precedents.

Despite the petitioners' suggestion to the contrary, in only one of this Court's reservation-diminishment decisions has this Court found that a surplus land act had the effect of terminating, in its entirety, the existence of an Indian reservation. *See DeCoteau v. District County Court*, 420 U.S. 425, 426, 95 S.Ct. 1082, 1084, 43 L.Ed.2d 300 (1975) (finding that an 1891 Act "terminated" the Lake Traverse Indian Reservation). In *every* other instance where this Court has examined a surplus land act, it has found either that (1) Congress did not intend to affect the "Indian country" status of the opened lands, *see Solem v. Bartlett*, 465 U.S. 463, 481, 104 S.Ct. 1161, 1171, 79 L.Ed.2d 443 (1984) (Cheyenne River Sioux Reservation "was not diminished" by the Act of May 29, 1908); *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973) (Klamath River Reservation "was not terminated" by 1892 Act); *Seymour v. Superintendent*, 368 U.S. 351, 355, 82 S.Ct. 424, 427, 7 L.Ed.2d (1962) (1906 Act did not "destroy the existence of the diminished Colville Indian Reservation"), or that (2) Congress intended to diminish the boundaries of the affected reservation by removing from the *existing* reservation those lands that were opened to non-Indian settlement. *See Hagen v. Utah*, *supra*, 510 U.S. at 421, 114 S.Ct. at 970 (Uintah Indian Reservation "has been diminished by Congress"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 614, 97 S.Ct. 1361, 1377, 51 L.Ed.2d 660 (1977) (by various Acts, Congress intended "to change the boundaries of the original

1889 Rosebud Reservation").[10]

Notwithstanding this Court's clear precedent, the petitioners argue that *DeCoteau* establishes a *per se* rule from which the Tenth Circuit deviated in *Ute Indian Tribe V.* With *DeCoteau* as their lone and questionable benchmark, the petitioners argue that this Court's conclusion that the Uintah Valley Reservation was *diminished* by the 1902-1905 Acts, in fact means that the Reservation was *terminated* and that the only lands within the Uintah Valley Reservation that remain "Indian country" are those lands that are held in trust status. *See* Pet. Br. at 14-20.

The petitioners' argument ignores the clear language of this Court's precedents. When this Court determines that an Indian reservation has, or examines whether an Indian reservation may have, been terminated, in its entirety, so that the only remaining "Indian country" consists of trust lands, this Court uses clear language to that effect. *E.g., DeCoteau v. District County Court, supra*, 420 U.S. at 426, 95 S.Ct. 1082 (reservation was "terminated"); *Seymour v. Superintendent*, 368 U.S. at 355, 82 S.Ct. at 427 (North Half of reservation was "wiped out"); *id.* (existence of South Half of reservation was not "destroy[ed]").

In *Rosebud Sioux Tribe*, the Court acknowledged that it knows the difference between a finding that a reservation has been diminished and a finding that a reservation has been extinguished:

> unlike the situation in *DeCoteau*, we are not faced with an Act which, if it *disestablished*

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[10] The Court also has summarily concluded that language providing that the North Half of the Colville Indian Reservation should be "*vacated* and restored to the public domain" had the effect of "wiping out" that section of the Colville Reservation. *See Seymour v. Superintendent, supra*, 368 U.S. at 355, 82 S.Ct. at 427 (emphasis added).

> the area under question, would *terminate* the entire reservation.

430 U.S. at 598, n.20, 97 S.Ct. at 1368, n.20 (emphasis added). In *Hagen*, the Court did not state that the Uintah Valley Reservation had been terminated. Rather, as the Tenth Circuit acknowledged, *see* 114 F.3d at 1530, it stated clearly and unequivocally that the Reservation continues to exist, albeit diminished in size. *See* 510 S.Ct. at 421, 114 S.Ct. at 970 ("[w]e conclude that the Uintah Indian Reservation has been diminished by Congress."). *See also* 510 U.S. at 432, 114 S.Ct. at 976 (Blackmun, J., dissenting) ("the Uintah Valley Reservation *unquestionably* survived the opening. . .") (emphasis added). *Accord State v. Perank*, 858 P.2d at 934 ("all parties agree that the Uintah Reservation . . . continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use.").

Because both this Court and the Utah Supreme Court found that the Uintah Valley Reservation continued to exist after 1905, the Tenth Circuit was correct in rejecting the petitioners' argument that lands that passed out of fee status pursuant to statutes other than the 1902-1905 Acts are no longer "Indian country". Accordingly, the petition for a writ of *certiorari* to review *Ute Indian Tribe V* should be denied.

B. *Ute Indian Tribe V* Correctly Holds That all Lands on the Uintah Valley Reservation That Were Not Restored to the Public Domain Remain "Indian country".

In an effort to persuade this Court to grant their petition for a writ of *certiorari*, the petitioners erroneously characterize the Tenth Circuit's decision in *Ute Indian Tribe V* as being unique among reservation diminishment cases in that it "leave[s] substantial non-Indian fee lands within

original reservation boundaries *after an area had been restored to the public domain.*" Petitioners' Br. at 16 (emphasis in original). Again, the petitioners' assertion attempts to alter the history of land ownership on the Uintah Valley Reservation and mischaracterizes the Tenth Circuit's ruling in *Ute Indian Tribe V*.

When this Court decided *Hagen v. Utah*, it determined that language in the operative section of a surplus land act "restor[ing] unallotted reservation lands to the public domain" had the talismanic effect of diminishing the affected reservation "with respect to those lands [so restored]". *See Hagen v. Utah, supra*, 510 U.S. at 414, 114 S.Ct. at 967. As the district court correctly noted, *see Ute Indian Tribe IV*, 935 F.Supp at 1501-05, and the Tenth Circuit affirmed, *see Ute Indian Tribe V*, 114 F.3d at 1528, *none* of the disputed fee lands was ever "restored to the public domain." Rather, *all* of those lands were included as trust lands within the diminished Uintah Valley Reservation as it existed in 1905, *after* the unallotted lands on the Reservation were opened to non-Indian settlement.

The lands within the disputed categories were transferred from trust to fee status under the authority of statutes *other* than the 1902-1905 Acts, *none* of which contains the talismanic phrase "restored to the public domain". *See Ute Indian Tribe IV*, 935 F.Supp. at 1501-05. Neither this Court nor the Utah Supreme Court has examined the effect that those *other* statutes had on the "Indian country" status of the disputed fee lands.

In determining whether, and to what extent, an Indian reservation has been diminished:

> [t]he first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and

> no matter what happens to the title of individual plots within the area, the entire block retains its reservation status unless Congress explicitly indicates otherwise.

Solem v. Bartlett, 465 U.S. at 470, 104 S.Ct. at 1166. The district court applied this rule when it determined that the three disputed categories of fee land on the Uintah Valley Reservation remain "Indian country" under 18 U.S.C. § 1511(a), as being lands "within the limits of an Indian reservation." *See* 935 F.Supp. at 1496-1505. In affirming the district court's analysis and conclusion, the Tenth Circuit correctly determined that:

> 1. *Hagen* directly conflicts with *Ute Indian Tribe III*, insofar as that decision held that those lands restored to the public domain under the 1902-1905 Acts remained "Indian country"; but that
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> 2. Because *Hagen* did not (because it did not need to) address the "Indian country" status of the three disputed categories of fee land (i.e., those lands that passed from trust to fee status under statutes other than the 1902-1905 Acts), *Hagen* does not directly conflict with *Ute Indian Tribe III*, insofar as that decision held that the latter three categories of fee land remain "Indian country".

See 114 F.3d at 1528.

Because neither this Court nor the Utah Supreme Court has ever examined the effect that the General Allotment Act, the Ute Termination and Supervision Act, and the Indian Land Consolidation Act had on the "Indian

country" status of lands that passed from trust to fee status under there authority of those Acts, there can be no conflict between the Tenth Circuit's decision with respect to those lands and any decision of this Court or of the Utah Supreme Court. The absence of any conflict between *Ute Indian Tribe V* and any decision of this Court or of any State supreme court militates in favor of this Court denying the petition for writ of *certiorari*.

II. *Ute Indian Tribe V* Does Not Conflict With Any State Supreme Court Decision, Including *State v. Perank*.

The petitioners suggest that the Tenth Circuit's refusal to conclude that all fee lands within the Uintah Valley Reservation are no longer within "Indian country" conflicts with the Utah Supreme Court's ruling in *State v. Perank*, 858 P.2d 927 (Utah 1992). Again, the petitioners misstate a judicial ruling.

In *Perank*, the limited question before the Utah Supreme Court was "whether the unallotted and unreserved lands that were opened to entry in 1905 . . . are within the present boundaries of the [Uintah Valley] Reservation." *See* 858 P.2d at 934. In answering that question, the Utah Supreme Court analyzed the 1902-1905 Acts that opened the unallotted lands on the Uintah Valley Reservation to non-Indian settlement and

> conclude[d] that operative statutory language that restores reservation land to the public domain is persuasive evidence of congressional intent *to diminish the reservation as to the land so restored.*

858 P.2d at 940 (emphasis added). The conclusion of the

Utah Supreme Court is expressed in functionally identical language to the conclusion that this Court reached in *Hagen*, to wit:

> [w]e hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act *diminished* the reservation.

510 U.S. at 414, 114 S.Ct. at 967 (emphasis added). As discussed in Part I(A), above, the Tenth Circuit correctly applied this Court's (and the Utah Supreme Court's analogous) conclusion when it *rejected* the petitioners' argument that a *diminished* reservation equates to a *terminated* reservation. Consistent with *Hagen* (*and* with *Perank)*, the Tenth Circuit modified its 1985 mandate by excluding from "Indian country" those lands on the Uintah Valley Reservation that were restored to the public domain under the 1902-1905 Acts. Because the Tenth Circuit's actions are completely consistent with this Court's holding in *Hagen* (and with the Utah Supreme Court's comparable ruling in *Perank*), the petition for a writ of *certiorari* to review *Ute Indian Tribe V* should be denied.

III. The Petitioners' Attempt to Use this Court's Supervisory Authority to Address Issues that this Court Did Not Address in *Hagen* and that the Utah Supreme Court Expressly Declined to Address in *Perank* Should be Rejected.

On September 17, *1985*, the Tenth Circuit entered its judgment in *Ute Indian Tribe III*. In that judgment, the Tenth Circuit ruled that lands set aside from the Uintah Valley Reservation as a national forest and all lands within the Uncompahgre Reservation remained "Indian country". *See* 773 F.2d at 1089-90 (National Forest); 773 F.2d at 1090-93 (Uncompahgre Reservation). The Counties (at that time, joined by the State of Utah) petitioned this Court for a writ of *certiorari* to review, among other things, the Tenth Circuit's decision with respect to the national forest lands and Uncompahgre Reservation. This Court denied the Counties' petition on December 1, 1996. *See Utah v. Ute Indian Tribe*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986).

More than 10 years after *Ute Indian Tribe III* was entered as a final judgment, the Counties asked the district court and, later, a panel of the Tenth Circuit to overrule the Tenth Circuit's *en banc* decision that the national forest lands and the Uncompahgre Reservation remain Indian country. In declining the Counties' request to upset a judgment that had been final for more than a decade, the Tenth Circuit correctly observed that this Court had not addressed the status of the national forest lands or the Uncompahgre Reservation in *Hagen*, *See* 114 F.3d at 1528-29.[11] The court then went on

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[11] Similarly, the Utah Supreme Court expressly disavowed any intention to determine the "Indian country" status of those lands in *State v. Perank*. *See* 858 P.2d at 934 ("The legal status of the [Ashley and

(continued...)

to declare *Ute Indian Tribe III* to be, and to have been for more than 12 years, a final judgment (a fact that the petitioners have been unable to accept for more than a decade). *See* 114 F.3d at 1521. Because *Ute Indian Tribe III* was no longer *sub judice* when this Court published its decision in *Hagen*, the Tenth Circuit found that the change in the law effected by *Hagen* could not be used to "reopen the door already closed". *Id.* at 1521, quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541, 111 S.Ct. 2439, 2446, 115 L.Ed.2d 481 (1991). Accordingly, the Tenth Circuit declined to withdraw its 1985 mandate in its entirety, finding that:

> [t]o the extent that *Ute Indian Tribe III* decided matters not addressed in *Hagen*, finality requires those decisions to remain undisturbed. Thus, we modify our earlier judgment *only to the extent that it directly conflicts with the holding in Hagen.*

114 F.2d at 1527.[12] The Tenth Circuit expressly stated that its decision to modify the mandate in *Ute Indian Tribe III* "does not result from the desire to correct a prior erroneous judgment, but rather from the need to reconcile our decision with a directly conflicting decision of the Supreme Court." *Id.* at 1528.

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[11](...continued)
Uintah National Forests] is not at issue here, nor is the legal status of the Uncompahgre Reservation.").

[12] Under the Tenth Circuit's modified mandate, and consistent with this Court's holding in *Hagen v. Utah*, all fee lands, except those that were restored to the public domain pursuant to the 1902-1905 Acts, remain "Indian country". *Ute Indian Tribe V*, 114 F.3d at 1529-31.

Through their petition for a writ of *certiorari*, the petitioners are asking this Court to reopen a door that has been closed for more than 10 years: they are asking this Court to declare the national forest lands and the Uncompahgre Reservation to be outside of "Indian country". *See* Pet. Br. at 14, n.6. This Court should decline the Counties' request, as did the Tenth Circuit.

This Court will grant a petition for a writ of *certiorari* only for compelling reasons. *See* Sup. Ct. Rule 10. Those reasons include when:

> a United States court of appeals . . . has decided an important federal question in a way that conflicts with a decision by a state court of last resort. . . ; or when
>
> a United States court of appeals has decided . . . an important federal question in a way that conflicts with relevant decisions of this Court.

Id. at (a), (c). As discussed at n.11, above, neither this Court, in *Hagen*, nor the Utah Supreme Court, in *Perank*, addressed the status of the national forest lands or of the Uncompahgre Reservation. Accordingly, there is no conflict with *Ute Indian Tribe III's* holding regarding those lands and *any* decision of this Court or of any state court of last resort, and there is no basis for granting the petition for a writ of *certiorari* under Sup. Ct. Rule 10(a) or (c).

More importantly, a petition for writ of *certiorari* must be filed within 90 days after entry of the judgment sought to be reviewed. *See* Sup. Ct. Rule 13(1). The last court that addressed and decided the "Indian country" status of the national forest lands and of the Uncompahgre Reservation on the merits was the Tenth Circuit . . . in 1985 in *Ute Indian Tribe III*. Notwithstanding Sup. Ct. Rule 13(1), the petitioners have asked this Court to review that

decision not 90, but *4,098*, days after the judgment was entered. Pursuant to this Court's rules, the petitioners' request should be denied.

CONCLUSION

For more than 22 years, the petitioners have been urging the federal and state courts to terminate the existence of the Uintah Valley Reservation. *Every* court which has heard the petitioners' arguments - including the federal district court for the District of Utah, the United States Court of Appeals for the Tenth Circuit, the Utah Supreme Court, and the Supreme Court of the United States -has rejected those arguments and has found, instead, that the Uintah Valley Reservation was merely diminished by the exclusion therefrom of unallotted, opened lands of the Reservation that were restored to the public domain.

Through their petition for a writ of *certiorari*, the petitioners unabashedly seek to expand this Court's ruling in *Hagen*, and thereby realize the same result that they would have achieved had *any* court accepted their argument that the Uintah Valley Reservation was extinguished. The petitioners simply should not be permitted to use this Court's supervisory powers to disturb a final judgment that was entered more than 12 years ago.

In *Hagen*, this Court found that the Uintah Valley Reservation was diminished by the restoration of unallotted Indian lands to the public domain under the 1902-1905 Acts. As a consequence of that ruling, the Ute Indian Tribe has lost the authority to govern the conduct of its members on hundreds of thousands of acres of land. The petitioners' attempt to expand this Court's ruling to a determination that the Reservation was extinguished, an expansion that would deprive the Tribe of the authority to govern its members' conduct on millions of additional acres, should be rejected.

As the petitioners acknowledge, they do not qualify for a writ of *certiorari*. *See* Pet. Br. at 30. In that respect, the petition is accurate. Because the Tenth Circuit's decision in *Ute Indian Tribe V* is consistent with this Court's judgment in *Hagen*; this Court's decisions in every other reservation-diminishment case; and the Utah Supreme Court's opinion in *State v. Perank*, the petition for a writ of *certiorari* to review *Ute Indian Tribe V* should be denied.

Respectfully submitted this 31st day of October, 1997.

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No. 97-570

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DUCHESNE COUNTY, a political subdivision of the State of Utah, UINTAH COUNTY, a political subdivision of the State of Utah,
Petitioners,

v.

UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah, a federally recognized tribe of Indians,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

ARGUMENT

Introduction

In the Brief in Opposition, Respondent Ute Tribe clearly overstates its case in several respects, is simply mistaken in others and fails to address additional arguments of substantial importance. In reply, Petitioner Counties will first address the role of the United States in this litigation and then briefly address each of the significant points raised in opposition. Initially, however, we summarily set forth the most recent proceedings in the United States District Court in Utah, where the Counties continue to be enjoined from implementing the mandate in *Hagen v. Utah*, 510 U.S. 399 (1994).

I. THE UNITED STATES DISTRICT COURT IN UTAH HAS CONTINUED TO ENJOIN PETITIONERS FROM IMPLEMENTING THE *HAGEN* MANDATE.

The current proceedings in federal district court in Utah are more than indirectly involved in this case. Petitioners have previously recounted the manner in which the mandate of this Court in *Hagen* has been held in abeyance month after month and year after year. Pet. at 1-2, 5-9. The United States District Court has continued to enjoin the Counties from implementing the *Hagen* mandate, even with respect to the homestead and townsite lands resolved by the panel's decision. Not surprisingly, the Ute Tribe supports the position of the district court in this respect. The district court's decision to continue the injunction in effect was issued in spite of the fact that the mandate of the panel's decision has now issued and in spite of the fact that a cross petition was not filed by the Ute Tribe in this Court.

Most recently, on October 15, 1997, the counties filed a "Motion to Remove Injunction Against All Homesteaded Land" in the district court. At the next previously scheduled status and scheduling conference, the issue of the

pending motion was raised by the Counties and immediately denied, without argument, in the following fashion:

> [THE COUNTIES:] As you know the county has filed its request that the injunction for the remaining Homestead lands be lifted.
>
> THE COURT: I won't deal with that until such time that the Supreme Court speaks on the petition that is currently pending.

Tr. of Court Proceedings at 9, *Ute Indian Tribe v. Utah* (Oct. 21, 1997) (No. 75-CV-408-J).

Although the district court had acknowledged receipt of the mandate from the Tenth Circuit in a hearing on a similar motion involving the City of Roosevelt the previous month, no further explanation on this point was offered. In the Roosevelt hearing, the district court unequivocally stated:

> THE COURT: Well, the mandate is here, and since the amendment by the Tenth Circuit in *Hagen* has been entered, and their mandate to this Court, it seems to me that I have *no real alternative* but to grant the motion of Roosevelt City. . . .

Tr. of Court Proceedings at 8, *Ute Indian Tribe v. Utah*, (Sept. 8, 1997) (No. 75-CV-408-J) (emphasis added). The court was mistaken if it thought that a petition for certiorari, without more, stayed the mandate and provided the court with an "alternative." *Id.*

The Counties have appended excerpts from the transcript of the status report and scheduling conference in which their motion was denied. Reply App. at 1a-5a. The excerpts make clear that in the absence of some definitive action by this Court, the mandate of this Court in *Hagen* will not be implemented at any time in the foreseeable future.[1] Because of the "jurisdictional chaos" format of "Indian country" adopted by the district court in the first instance and later accepted by the panel in

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[1] The Counties understand Fed. R. App. P. 21 provides a potential remedy. However, under the circumstances in this case it is not an acceptable alternative.

the Tenth Circuit, the federally funded and tribally assisted tract by tract *title* opinions and corresponding *mapping* processes, involving "28" different land categories and hundreds of thousands of acres, started over three years ago, are still not complete. Indeed, even a cursory review of the excerpts from this hearing leaves one with the distinct impression that the "monumental job" might never be completed. Reply App. at 3a.

II. THE UNITED STATES SHOULD BE INVITED TO EXPRESS ITS VIEWS TO THIS COURT.

In opposition, the Ute Tribe mentions that, from the beginning, it has been "supported by the United States" in its post-*Hagen* assertion that this Court did not intend that *Hagen* affect historic reservation boundaries in the traditional sense. Resp'ts Br. in Opp'n to the Pet. for a Writ of *Cert.* at 12. *Duchesne County and Uintah County, Utah v. Ute Indian Tribe* (No. 97-570). *Nevertheless, to date, the United States is conspicuously absent in the proceedings before this Court.* For some unstated reason, for the first time in two decades the United States has decided not to submit an *amicus curiae* brief in support of the Ute Indian Tribe. The Counties respectfully submit that a few comments on this "litigation" decision are appropriate.

In the courts below, the United States unequivocally supported the post-*Hagen* argument of the Ute Indian Tribe.[2] In this respect, the arguments of the United States were contrary to two decades of submissions by the United States in cases in this Court, including *Hagen*. This Court should invite the United States to express its views and explain the reasons that prompted this radical

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[2] The arguments differed only in two respects. First, not even the United States could support the collateral estoppel claim of the Ute Tribe (which is never mentioned in the Brief in Opposition). The Ute Tribe argued that the State and the Counties could not rely on *Hagen* because of collateral estoppel—that the decision of this Court in *Hagen* was meaningless in all significant respects. Pet. App. at 17a. Secondly, the United States agreed with the State and Counties that the Uncompahgre reservation no longer exists.

shift in legal analysis. For example, the United States could then explain how it could, in this Court, agree with the meaning of the precedent and the scope of the issue presented in *Hagen*, and yet tell the courts below (in support of the Ute Indian Tribe) that historic reservation boundary disestablishment was not an issue in *Hagen*.

The absence of the United States here is even more perplexing in light of the most recent litigation position adopted by the United States. In a case pending in this Court, the United States has told this Court that it has a "strong interest in protecting the integrity of reservation boundaries" *in general*. Br. for the United States Supp'g Resp'ts, *South Dakota v. Yankton Sioux Tribe*, at 1 (No. 96-1581). In furtherance of that interest, the United States should not simply remain silent here. The United States, at the very least, should explain how, in this case, it could tell this Court one thing and then tell the court below a different story.

In the past, this Court has often requested the United States to express its views when similar questions of federal Indian law were presented. In this instance, Petitioners would respectfully submit that such a request would be especially appropriate. The United States agreed that certiorari should be granted in *Hagen* to resolve the conflict between the state and federal decisions. Br. of the United States as *Amicus Curiae* at 15, *Hagen* (No. 92-6281). And the United States participated from the beginning in the *Ute* litigation and in *Hagen* as *amicus curiae*. In fact, the arguments of the United States are noted and rejected in the text of the *Hagen* opinion. *Hagen*, 510 U.S. at 411-412.[8] In the Tenth Circuit, the United States was instrumental in convincing the courts to adopt the post-*Hagen* argument of the Ute Tribe that

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[8] All of the briefs of the United States in the diminishment/disestablishment cases prior to *Hagen* were reproduced in an appendix submitted by Uintah County in *Hagen*. In *Yankton*, Charles Mix County, *amicus curiae*, has reproduced all of the same briefs, including the brief for the United States in *Hagen*. Br. of Charles Mix County, *Amicus Curiae*, in Supp. of Pet'r. *South Dakota v. Yankton Sioux Tribe* (May 7, 1997) (No. 96-1581).

promises undisputed "jurisdictional chaos." In this light, the views of the United States should be a matter of record in this Court.

III. "THE DECISION OF THIS COURT IN *HAGEN* HAS BEEN MISCONSTRUED TO PRESERVE HISTORIC RESERVATION BOUNDARIES CONTRARY TO SUBMISSIONS IN *HAGEN* AND CONTRARY TO RELATED PRECEDENT OF THIS COURT."

A. The Counties Do Not "Admit" That This Case Is Not Certworthy.

The Counties submitted the reason for granting the writ in this case quoted above. As a preliminary matter, the Counties first address the assertion in Respondents' Brief in Opposition that our Petition *concedes* that this case is not worthy of the attention of this Court. According to the Ute Tribe:

> [T]he petitioners ultimately admit that they do not meet this Court's criteria for being granted a petition for writ of *certiorari*. *See* Pet. Br. at 30. Thus, in desperation, they appeal to this Court for "some type of appropriate relief."

Resp'ts Br. in Opp'n to the Pet. for Writ of *Cert.* at 17. *Duchesne County and Uintah County, Utah v. Ute Indian Tribe* (No. 97-570).

The Ute Tribe cites only the Petition at 30 in support of this assertion. The Petition at 30 sets forth the "CONCLUSION" of the Petition. The consideration reflected in the "CONCLUSION" is simply a recognition of the extraordinary demands on this Court's discretionary certiorari jurisdiction. In this instance, the Ute Tribe is clearly mistaken. We respectfully repeat our request for the certiorari consideration requested there.

B. The Counties Do Not "Misapprehend" This Court's Reservation Diminishment/Disestablishment Jurisprudence.

In response to the specific discussion in the Petition directed to the Tenth Circuit's misreading of *Hagen*, the Brief in Opposition begins with a general argument that:

> [P]etitioners misapprehend this Court's previous reservation-diminishment decisions, generally, and this Court's decision in *Hagen*, specifically.

Id.

For two decades, Duchesne County, Utah and Uintah County, Utah have participated as parties in all litigation related to this disestablishment issue. Even a cursory review of any of the briefs submitted in this litigation or in *Hagen*, including those of the Counties, demonstrates the frailty of this claim. While the Counties might not have all the answers, we at least know the question and understand the issue we briefed over a twenty-year period of time.

In the first instance, there is no disagreement in any of these briefs regarding the scope of any of this Court's reservation disestablishment/diminishment decisions or the scope of *Hagen*. Again, the Ute Tribe is simply mistaken. Further, the Brief for the *Amici* States unequivocally supports the petition in both respects—the scope of this Court's precedent and the meaning of this Court's decision in *Hagen*. Br. for the States of California and Colorado as *Amici Curiae*, in Supp. of Pet'rs at 3-12, *Duchesne County and Uintah County, Utah v. Ute Indian Tribe* (No. 97-570). Importantly, a number of *amici* States participated in *Hagen* and in all related litigation of this Court.

C. The Ute Tribe Does Not Respond To The Graphic References To Disestablishment Submitted In *Hagen* That Are In Express Conflict With The View Of The Panel In The Tenth Circuit.

The Counties went to great length in the Petition to document the extent to which the submissions to this Court in *Hagen* are in express conflict with the views of the Tenth Circuit regarding the holding of *Hagen*. *The Ute Tribe responds to none of this—even though the most graphic references to a disestablished reservation are in the briefs submitted by the Ute Tribe in Hagen.*

For example, as we noted in our Petition, the Ute Tribe told this Court when opposing certiorari in *Hagen* in November, 1992:

> [T]he issue of whether Congress intended to *disestablish* the Uintah Valley Reservation, Utah.

Br. of Ute Indian Tribe in Opp'n to Cert. at 1, *Hagen* (No. 92-6281) (emphasis added). *See* Pet. at 24.

On the merits, the Ute Tribe next filed a motion to intervene as a matter of right in this Court in May, 1993. Again, the Ute Tribe repeatedly stressed the scope of the issue presented. Mot. of Ute Indian Tribe to Intervene as a Matter of Right at 2, 4-5, 7-8, 8-9, 9 n.5, 10 n.7, *Hagen* (No. 92-6281). *See* Pet. at 25-26. And in June, 1993, the Ute Tribe then submitted its brief *amicus curiae* in this Court. For the third time, the Ute Tribe described to this Court the issues in exactly the same manner:

> While a decision that the Reservation has been *disestablished* would subject *Indians* to the full panoply of *state* law for conduct on *non-trust lands*. . . . Therefore, any discussions between McLaughlin and the Utes were *irrelevant* except to the extent, if any, that they influenced Congress to abandon any intent it may have had to *disestablish* the Reservation.

Br. of Ute Indian Tribe at 10 n.11, 25 n.25, *Hagen* (No. 92-6281) (emphasis added). *See* Pet. at 26-27.

All other arguments submitted in *Hagen* reflect this same understanding. Pet. at 22-29. The claim in opposition that historic reservation boundaries were not at issue in *Hagen* is clearly incorrect.

D. The Claim Of The Ute Tribe That Additional Statutes Must Be Construed Is Without Merit.

To the extent that the briefs submitted to this Court in *Hagen* and the decision in *Hagen,* in proper context, establish that historic reservation boundaries were at issue in *Hagen,* the balance of Respondent Ute Tribes' opposition regarding the "three disputed categories of fee lands" (lands, by the way, that are not owned or populated by

members of the Ute Tribe) and the purported need for the construction of the additional statutes related to these fee lands is simply more smoke and mirrors. In the area at issue in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), or in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), or in any similarly affected area, when historic reservation boundaries were disestablished, the area ceased to be "Indian country" except for the "trust" lands—and this is true irrespective of how the other lands in the area eventually attained fee status. The applicable decisions in this Court support this position unequivocally. *See also United States v. Pelican*, 232 U.S. 442 (1913). The Ute Tribe and the Tenth Circuit recognized this principle prior to *Hagen*. Nothing in *Hagen* was intended to alter that fundamental understanding.

IV. THE EIGHTH CIRCUIT COURT OF APPEALS SQUARELY REJECTED THE VIEW OF *HAGEN* ADOPTED BY THE TENTH CIRCUIT WITH RESPECT TO THE YANKTON RESERVATION.

In the petition, the Counties pointed out the far-reaching consequences that the misreading of *Hagen* promises in other circuits (the United States raised the same argument in the Eighth Circuit). Pet. at 2, 19. As we noted, for that reason the Counties also filed an *amici curiae* brief in *Yankton Sioux Tribe v. Southern Missouri Waste Dist.*, 99 F.3d 1439 (8th Cir. 1996), *cert. granted sub nom. South Dakota v. Yankton Sioux Tribe*, 117 S.Ct. 2430 (1997) (No. 96-1581). That brief recounts, in some detail, the legal arguments that demonstrate the extent to which *Hagen* has been seriously misconstrued by the panel in the Tenth Circuit. Br. of Duchesne County, Utah and Uintah County, Utah, *Amici Curiae*, in Supp. of Pet'r., *South Dakota v. Yankton Sioux Tribe*, (August 7, 1997) (No. 96-1581).

We initially assumed, because the Eighth Circuit Court of Appeals in *Yankton* generally rejected the Yankton disestablishment argument, it was not really necessary for that Court to deal with the post-*Hagen* argument the

United States had submitted there. In this respect, we were mistaken. We failed to notice that the Eighth Circuit actually set forth the primary disestablishment passage in *Hagen*, along with additional language from both *Rosebud* and *DeCoteau*, in the text of the *Yankton* opinion because the *Yankton Tribe and the court* deemed the Yankton documentation to be much less persuasive of disestablishment in comparison.

> The tribe argues that these comments are very weak when compared to statements made by, or to the Indians, in cases where diminishment was found. . . . In *Hagen*, the tribe was informed:
>
> > You say that [the reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no boundary line to this reservation.
>
> *Hagen*, 510 U.S. at 417, 114 S.Ct. at 968 (internal citations omitted).

Yankton Sioux Tribe, 99 F.3d at 1452.

Significantly, the Eighth Circuit then concluded:

> The Indians on these three reservations [*Hagen, DeCoteau, Rosebud*] were thus "clearly aware" that their reservations would be smaller after the sale of lands. Neither the commissioners nor the tribal members made like comments in this case. . . . [T]here is no statement that clearly indicates that Congress intended to change the reservation boundaries or remove tribal sovereignty over the opened areas. There are also no statements by members of the tribe that demonstrate an understanding that the reservation boundaries would change.

Id. at 1453.

This "change the reservation boundary" discussion did not need more clarification. The Eighth Circuit had made

the traditional *DeCoteau* "checkerboard pattern" point earlier in the opinion, consistent with the position of the Counties in this petition.

> A *checkerboard pattern* of jurisdiction would have been the result if the Yankton reservation had been diminished by the 1894 Act. . . . There factors distinguish this case from *DeCoteau*. . . .

Id. at 1449 (emphasis added).

Clearly, the "change the reservation boundary" discussion and the recognition of the traditional *DeCoteau* "checkerboard pattern" are both squarely inconsistent with the post-*Hagen* argument the United States submitted and the misreading of *Hagen* by the Tenth Circuit.[4]

CONCLUSION

In the Petition, the Counties requested that the Petition for a Writ of Certiorari be granted and for the Court to fashion some type of appropriate relief. Alternatively, we suggested that consideration of the Petition be deferred until after this Court had an opportunity to view the issue in light of the briefing and oral argument in *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581) (now scheduled for Monday, December 8, 1997) (the Yankton Sioux Tribe has divided oral argument with the United States). Because the United States has elected not to express its views to this Court regarding the panel's construction of *Hagen*, we now respectfully suggest that the United States be invited to do so at this time.

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[4] Of course, in all other respects we think the Eighth Circuit reached the wrong conclusion.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

[Excerpts from Transcript of Proceedings Dated October 21, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case 2:75-CV-00408

UTE INDIAN TRIBE,
Plaintiff,

vs.

STATE OF UTAH, *et al.*,
Defendant.

BEFORE THE HONORABLE BRUCE S. JENKINS

OCTOBER 21, 1997

REPORTER'S TRANSCRIPT OF PROCEEDINGS

STATUTE REPORT AND
SCHEDULING CONFERENCE

* * * *

[4] MR. THOMPSON: We have two very attractive maps.

* * * *

MR. THOMPSON: * * * If I may, I would like to walk the Court through what we have done to date, Your Honor, and then advise the Court the work that remains to be done because it is substantial.

* * * *

This is a compilation of I believe about 28 different land categories that were withdrawn from BIA files, BLM

files and county records. We started with these categories, and all of this has been digitized and had the individual tracks.

[5] * * * This map, Your Honor, takes the unidentified map and tries to commingle land ownership. And it's reduced to 10 categories. * * *

* * * These are our first draft efforts. They're far from final and will have subsequent maps.

Based on those categories and our understanding, collective understanding of the 10th Circuit decisions, we again commingled land and identified Indian Country, Outside Indian Country and what we call Status Under Review, and in all honesty, Your Honor, we do not know at this juncture.

* * * *

[6] The point where we are in the mapping effort, Your Honor, is we've come along way, but we've got a long way to go. We hope to have the cross hatched lands not including the townsites done, Your Honor, the areas that are under review within 90 days, and we would be willing to bring those back to the Court in 90 days. We even at that point, however, Your Honor, will not have the townsites of Myton and Randlett and Duchesne mapped. We simply do not have the resources or the time.

This map also shows as a general rule where river roads and stream locations should be, Your Honor. That does not mean where they are. So that needs to be corrected.

There are substantial ownership issues that have not been identified. Those are primarily the towns of Myton and Duchesne. There is a '62 decision, *United States vs. Utah* stipulated agreement under which the State of Utah agreed that Ute Indian Tribe owned bits of Duchesne and its tributaries and portions of the grid. Those beds have been moved. Those beds have been filled in by non-Indians, and homes and other items have been erected on them from the [7] original townsite maps. Those townsite

maps are no longer correct. All of the streets have been changed. They have been filed in. Patents have been issued. Extremely complicated. Potentially huge quiet title, Your Honor.

This map does not also, Your Honor, because we have no way at this point of overlaying, does not show minimal ownership. A substantial portion of the blue lands that appear on Map B are fee surface, but they overlay trust and reserves. So there is at least a split jurisdictional—or excuse—a division of jurisdiction over these lands depending on surface or subsurface.

And finally, Your Honor, the biggest problem we have, and I'm actually extremely proud of how far we have gotten to this point, is that there are 70 townships covered by this map, Your Honor. And those townships at least for the center of the map, the blue area and where that overlaps have to be done on a township-by-township basis so that police officers and others may identify where they are.

I will also point out that it now appears that we may—the northwestern border of Map B, Your Honor, northwest of Strawberry Acclamation area may be improperly drawn in here. We think there is a survey problem there from mountain top to mountain top as required.

* * * *

[8] * * * the federal government has been bearing the very brunt of the expense of this, within 90 days sometime after that. I believe we can have the townsites of Randlett and Myton done. It could be six months before Duchesne is done. I have no idea when we can have the townships done.

* * * *

THE COURT: Its a monumental job, and it looks like a very good beginning. * * *

* * * *

MR. GILLESPIE: We also commend the efforts of the BIA and the Ute Tribe and the BLM and all of those

who worked on [9] this map. As you know the county has filed its request that the injunction for the remaining Homestead lands be lifted.

THE COURT: I won't deal with that until such time that the Supreme Court speaks on the petition that is currently pending. I don't want to draw on them twice.

MR. GILLESPIE: * * * and I think Duchesne County is prepared to stipulate to the best map available for presumptive jurisdictional terms, and then on a case-by-case basis resolve any problems. While there's vast areas specifically of homesteaded lands that under the mandate that the Court has received should be able to be free from injunction at this point, and while the mapping process is not complete, the undertaking is probably the most—I mean, it's on the most unimaginably difficult to title search each parcel. * * *

* * * *

[10] MR. THOMPSON: * * * We have some of our own questions about their accuracy.

THE COURT: I was interested in seeing how you were doing. It's not an easy job, and it's a monumental job and for me an unending job.

MR. THOMPSON: Maybe for all of us, Your Honor.

* * * *

[11] I would suggest in response to what Mr. Gillespie has laid out on a case-by-case basis, Your Honor, we're looking at case-by-case 1983 violations. And I think that could take us off to another direction.

* * * *

[12] THE COURT: * * * And I could say come back in 10 years, but I think we're better off to say come back in 90 days.

MR. THOMPSON: Yes. And we may on that date have a map with another date knowing that we will have another map with another date.

THE COURT: And you have a whole rainbow spectrum really of interesting questions that people in the

interim ought to be thinking some about. Your suggestion where you have surface and subsurface rights is a very novel kind of question dealing with jurisdiction and persons. I've often thought it would be nice if the members of the Supreme Court could implement their own decisions.
* * *

* * * And quite frankly, I don't intend to set anything down for consideration, the [13] outcome of which is dependent upon the petition. And in the event that that's resolved, we'll set them down with appropriate notice.

* * * It's not an easy task, but it will be nice once that it's accomplished and people can feel a little more at ease.

* * * *

(4)

No. 97-570

Supreme Court, U. S.
FILED
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DUCHESNE COUNTY, a political subdivision of the State of Utah, UINTAH COUNTY, a political subdivision of the State of Utah,
Petitioners,

v.

UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah, a federally recognized tribe of Indians,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE STATES OF CALIFORNIA AND COLORADO AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS DUCHESNE COUNTY, UTAH, AND UINTAH COUNTY, UTAH

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-570

DUCHESNE COUNTY, a political subdivision of the State of Utah, UINTAH COUNTY, a political subdivision of the State of Utah,

Petitioners,

v.

UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah, a federally recognized tribe of Indians,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE STATES OF CALIFORNIA AND COLORADO AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS DUCHESNE COUNTY, UTAH, AND UINTAH COUNTY, UTAH

INTERESTS OF *AMICI CURIAE*

Federal Indian law decisions in the Tenth Circuit are always the subject of special concern because of the considerable reservation acreage within that circuit. For that reason, the State of California appeared as an *Amici Curiae* in *Hagen v. Utah*, 510 U.S. 399 (1994). As we told the Court at that time, the *Amici* States' interests in *Hagen* were substantial:

> This case presents an issue of substantial importance to *Amici* and other States with present and former Indian reservations. In 1985, the United States Court of Appeals for the Tenth Circuit concluded

> that Acts of Congress with operative language restoring Indian reservations to the public domain were *not* intended to *disestablish* those reservations. *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986). The Court of Appeals premised its decision on a misreading of *Solem v. Bartlett*, 465 U.S. 463 (1984), and plaintiffs in New Mexico and elsewhere specifically relied on this misreading in an attempt to *resurrect boundaries* of Indian reservations long deemed *disestablished*. . .
>
> *Amici* States have an obvious sovereign interest in knowing, with *some degree of certainty, where the boundaries of Indian reservations are located.* The present petition presents a valuable opportunity to continue the process, begun by the Court's modern decisions in *Seymour v. Superintendent*, 368 U.S. 351 (1962), of defining the manner in which surplus land statutes of this kind affected Indian reservations throughout the United States.

Br. for the States of California, North Dakota, South Dakota, and Washington, as *Amici Curiae* in Supp. of Resp't State of Utah at 1-2, *Hagen*, (No. 92-6281) (footnote omitted) (emphasis added).

The decision of this Court in *Hagen* went a long way toward defining and clarifying the manner in which public domain statutes of this kind affected Indian reservations. The decision of the panel in the Tenth Circuit has directly turned *Hagen* on its head, causing more uncertainty and confusion than existed prior to that time.[1]

---

[1] *Amici* States understand that Utah has filed an Appearance and Waiver Form in this Court indicating that while it was aligned with Petitioners below, the State has not joined in the filing of a Petition and did not anticipate any response "unless requested by the Court." According to the Petitioner Counties, settlement discussions on unrelated and related issues presumably prompted this decision. These considerations do not, of course, have any bearing on the merits of the Petition for Certiorari or the views expressed by the *amici* States in this *amici* brief.

SUMMARY OF ARGUMENT

The decision of the court of appeals directly conflicts with the decision of this Court in *Hagen*. Although the United States has apparently shifted its position, arguments submitted by the United States in another circuit confirms that this is an important federal question with unsettling consequences throughout the Country. In addition, the position adopted by the Tenth Circuit has been acknowledged to create unprecedented "jurisdictional chaos." Moreover, it conflicts in principle with all other disestablishment precedent of this Court and with every case in every circuit that has considered similar questions.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *HAGEN* AND THAT CONFLICT IS READILY APPARENT FROM THE COURT'S RATIONALE.

INTRODUCTION

In November 1992, the State of California was one of several western states to join in an *amici curiae* brief in *Hagen* in support of the Respondent Utah, concurring that the Petition for a Writ of Certiorari should be granted. Br. for the States of California, North Dakota, South Dakota, and Washington, as *Amici Curiae* in Supp. of Resp't State of Utah at 1-2, *Hagen*, (No. 92-6281). On the merits, the State of California joined in an additional brief for the States in further support of Respondent. Br. for the States of South Dakota, Arizona, California, Montana, Nevada and Oklahoma, as *Amici Curiae* in Supp. of Resp't State of Utah, *Hagen*, (No. 92-6281). As a result, the *Amici* States are very much aware of the question presented and decided in *Hagen*. The decision of the Tenth Circuit Court of Appeals in this case is in direct conflict with *Hagen* and that conflict is readily apparent from the rationale stated in the opinion. Pet. App. at 32a-35a (crux of court of appeals opinion).

Because the proceedings here are intertwined and tied to *Hagen* in every respect, this conflict is "truly" direct. Robert L. Stern, et al., *Supreme Court Practice*, § 4.5, at 174 (7th ed. 1993). As such, according to *Supreme Court Practice*, this case presents "one of the strongest possible grounds for securing the issuance of a writ of certiorari." *Id.* Sup. Ct. R. 10. The decision of this Court in *Hagen* has been grossly misconstrued by the Tenth Circuit Court of Appeals and that misconstruction could potentially disturb settled law throughout the Country. For these reasons, *Amici* States strongly urge this Court to grant certiorari and fashion appropriate relief.

In essence, the court of appeals held that, in *Hagen*, this Court *found* that Congress intended to somehow remove only homestead and townsite lands from the Uintah reservation, without otherwise disturbing historic reservation boundaries. Such a holding by this Court, however, would have been unprecedented and it would have been in conflict with all prior decisions of this Court (and every other court). Moreover, it would also result in "jurisdictional chaos," a fact that was unequivocally conceded in the *Hagen* proceedings. Pet. at 10-12. Nothing in *Hagen*, fairly construed, should have led the panel to the conclusion adopted here.

The reasoning of the panel supporting this conclusion can be readily examined because it is limited to two brief paragraphs. With historic reservation boundaries in place, the panel concluded that three other categories of non-trust lands would still be Indian country (i.e., the fee lands apportioned to the terminated Utes in the 1950's, the lands allotted to individual Indians that passed into fee status after 1905, and the lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status . . .). *Ute Indian Tribe*, 114 F.3d at 1529, Pet. App. 32a-33a.

> With respect to the other three categories of non-trust lands, the state and local defendants argue that these lands also are no longer within Indian country after *Hagen*. They contend that the Supreme Court

> in *Hagen* "clearly contemplated that the exterior boundaries of the Reservation would simply be gone." Appt. Brief, at 44. In other words, the defendants argue that the Court held that the 1902-1905 legislation completely terminated the Reservation such that no discrete, definable reservation boundaries now exist. Under the defendants' theory, there are no external boundaries and thus no "limits of any reservation." Indian country therefore is confined under § 1151(c) to "Indian allotments . . . which have not been extinguished," or trust lands. Under the theory that Indian country is limited to trust lands, the defendants argue that the three disputed categories of non-trust lands no longer constitute Indian country.
>
> We reject the defendants' argument that *Hagen* removed all non-trust lands within the original Uintah Valley Reservation from Indian country. In *Hagen*, the Supreme Court did not decide that the 1902-1905 allotment legislation completely disestablished the Uintah Valley Reservation, erasing its outer boundaries and rendering § 1151(a) inapplicable to the three disputed categories of non-trust lands. The Court in *Hagen* stated: . . . The Court stated that the Uintah Valley Reservation had been "diminished"—not "disestablished," "eliminated," or "terminated." Moreover, the diminishment was only "with respect to those lands" that had been restored to the public domain under the 1902-1905 legislation. *See Ute Indian Tribe IV*, 935 F.Supp. at 1487-88. We therefore conclude that *Hagen* did not erase the boundaries of the Uintah Valley Reservation and that the current "limits of [the] reservation" thus embrace the three categories of non-trust lands at issue. In sum, *Hagen* does not conflict with our holding in *Ute Indian Tribe III* that these categories of non-trust lands remain within Indian country under section 1151(a).

Ute Indian Tribe, 114 F.3d at 1530, Pet. App. 34a-35a.

In this respect, Petitioners have certainly demonstrated that the fundamental error of the panel centered around a failure to view the language of *Hagen* in context. This

amici brief is intended to unequivocally confirm that position.[2]

A. The Submissions of *Amici* States in *Hagen* Confirm the Direct Conflict.

1. *Brief of* Amici *States in Support of the Petition in* Hagen.

From the beginning, the States participating in *Hagen* as *amici curiae* also viewed the *Hagen* issue as it has

---

[2] Remarkably, nothing in the *Hagen* decision and nothing in the *Hagen* record can be cited to independently establish that the offense in *Hagen* would even be entirely excepted from Indian country under the panel's decision. The Utah Supreme Court opinion in *Hagen* expressly stated that:

> The plea Affidavit stated that defendant sold marijuana from his *residence* in Myton, Duchesne County, Utah.

State v. Hagen, 858 P.2d 925 (Utah 1992) (emphasis added). The Petiton noted that the offense took place in Myton, Utah. Pet. at 3, *Hagen* (No. 92-6281). The Statement of the Case in the Brief for Respondent State of Utah stated that the "offense occurred on *non-Indian lands near* the town of Myton, Utah." Br. for Resp't at 2, *Hagen* (No. 92-6281). (The "non-Indian lands" description, as opposed to lands held in trust for the tribe or its members, was the *traditional* determinative factor prior to this jurisdictional dispute, as *Hagen* establishes.) *See also* District Court of Duchesne County Transcript: "[T]his court is well aware the state takes the position that the Uintah Ouray reservation consists of trust lands, and that there is no testimony that the defendant was residing on trust land." Pet. App. I at 18, *Hagen* (92-6281). Under the panel's decision, historic boundaries still exist. As a result, this "non-Indian lands"/"trust lands" distinction would be meaningless.

The town of Myton, Utah, is certainly not Indian country, as *Hagen* establishes, and as the panel recognized. *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997). Nevertheless, under the criteria expressly set forth in the panel's opinion, a "title search" would have been necessary to establish jurisdiction in *Hagen* in the first instance. Pet. App. 35a. Of course, that was not the case in *Hagen*. The criminal offense occurred at Hagen's "residence" on non-Indian lands, a description sufficient for the traditional checkerboard tract search required by this Court. *DeCoteau*, 420 U.S. at 427 n.2, 446-447, *Rosebud*, 430 U.S. at 615, 615 n.48, *Solem*, 465 U.S. at 467 n.8.

been represented to this Court by Petitioners: namely, whether historic reservation boundaries in Utah were disestablished by the public domain acts in question. As we told this Court at the time the issue was first presented:

> Heretofore, the equation of public domain language with reservation *disestablishment* has been a *universally* accepted principle of federal Indian law.

Br. for the States of California, North Dakota, South Dakota, and Washington, as *Amici Curiae* in Supp. of Resp't State of Utah at 2, *Hagen*, (No. 92-6281) (emphasis added).

This Court in *Hagen* confirmed that assessment, but the Court of Appeals lost sight of that disestablishment principle in deciding this case.[8] Instead, the panel held that except for the homestead and townsite lands (but not other fee lands in the area) being somehow removed from Indian country status, the historic reservation boundaries otherwise remain intact. This was not the holding in *Hagen*.

Throughout the argument of the *amici curiae* States in *Hagen*, the issue was consistently and repeatedly referred to in the *traditional* manner:

> Until the *en banc* majority's decision, no court seriously questioned that operative language was not precisely suited to *disestablishment*.
>
> Indeed, in 1975, when this Court framed the issue in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), it did so in terms of an underlying inquiry for "public domain" indicia:
>
> > These two cases, consolidated for decision, raise the single question whether the Lake Traverse Indian Reservation in South Dakota, created by an 1867 treaty between the United States and

[8] Even before *Hagen*, commentators agreed with this assessment. David R. Williams, *State v. Perank: Is the Uintah-Ouray Reservation "Nailed Down Upon the Border?"*, 1992 B.Y.U.L. Rev. 1247.

> the Sisseton and Wahpeton bands of Sioux Indians, was *terminated and returned to the public domain, by the Act of March 3, 1891. DeCoteau, supra* at 426-427 (emphasis added).
>
> Even the *Rosebud* dissent expressly acknowledged that "restored to the public domain" was "clear language of express *termination*," as the Utah Supreme Court noted. Resp. App. 21a-22a. *Rosebud*, 430 U.S. at 618 (Marshall, J., dissenting).
>
> During the late 1800's and early 1900's Congress and the President frequently used public domain language to open Indian reservations for entry and settlement. Until the decision of the *en banc* majority, such restoration-to-the-public-domain language meant that the reservation was *disestablished*, a point well understood by the Utah Supreme Court, by this Court, by Congress, by the President, by the Department of the Interior and by the Department of Justice.

Id. at 3, 3-4, 4-5, 7-8 (footnotes omitted) (emphasis added).

Under the holding of the panel, the "disestablishment," "terminated," and "disestablished" descriptions noted there are rendered meaningless—yet these are terms *amici* states have understood according to the meanings given them under this Court's precedent in *Seymour, Mattz, DeCoteau, Rosebud* and *Solem*.

2. *Brief of* Amici *States in Support of Respondent State in* Hagen.

On the merits, the States' *amici* brief made clear that the issue in *Hagen* was whether the reservation was "disestablished" except for the "trust" lands. For example, in the "Summary of Argument:"

> As *Solem* itself indicates, through reference to *Seymour v. Superintendent*, 368 U.S. 351, 355 (1962), as cited at *Solem*, 465 U.S. at 470, language of an act which affirmatively returns land to the "public domain" is such "other language," which

> evidences a "total surrender of all tribal interests" and thus operates to *disestablish* the reservation. . . .
>
> Congress, in the "operative language," restored the subject lands to the public domain, and thus, in line with the well-established precedent *disestablished the reservation boundaries.*

Br. for the States of South Dakota, Arizona, California, Montana, Nevada and Oklahoma, as Amici Curiae in Supp. of Resp't State of Utah at 4, 6, *Hagen*, (No. 92-6281) (emphasis added).

Under the holding of the panel, the "disestablish the reservation" and "disestablished the reservation boundaries" descriptions noted there are also rendered meaningless.

Throughout the argument and in the conclusion, *amici* States in *Hagen* made the point several times, in several ways, but the issue remained the same. *Id.* at 7, 9, 10, 11, 12-13, 13, 14, 17. Again, the panel rendered meaningless the terms "termination," "disestablishment," "no outside boundary line," and "existence or nonexistence of reservation boundaries." *Id.*

With specific reference to the fact that reservation boundaries surrounding all lands (not just homestead and townsite lands) were at issue, as Petitioners establish, our merits brief in *Hagen* also unequivocally supports that conclusion. In the process of confirming that the number of tribal members living in the disputed areas (i.e. on nontrust lands) was not substantial, the "issue before this Court" was cast in the following terms:

> Further, of those 1,500 members, only about 300 live on the *actual nontrust lands at issue* before this Court. . . . Thus, using the figures most generously to the Tribe, approximately 92% of the persons within the historic boundaries are non-Indian. Utilizing the number of Native Americans who reside upon the *land actually at issue in this case*, the statistics become even more overwhelming. Of the approximately 18,000 persons who live on the *nontrust*

> *areas*, over 98% are non-Indian; only about 300 Native Americans live in the *nontrust areas*, as noted above.

Id. at 16 (emphasis added).

Under the holding of the panel, all the "nontrust lands" and "nontrust areas" descriptions noted there are rendered meaningless.[4]

B. The Submissions of Petitioner in *Hagen* Confirm the Direct Conflict.

As the Counties have noted, this is also the context in which the descriptions of Petitioner in *Hagen* were submitted. For example:

> The *status* of the Uintah Valley Reservation was the focus of attention, not the periphery of concern in the federal court litigation. . . . If the Court upholds the State of Utah Supreme Court decision of July 17, 1992, then the State of Utah and its subdivisions will exercise general civil and criminal jurisdiction over Indians whenever they are located off *trust* lands. . . .

Br. of Pet'r. at 16-17, 29, *Hagen*, (No. 92-6281) (emphasis added).

Again, under the holding of the panel, the "trust" lands descriptions noted there are rendered meaningless. And in the Reply Brief, Petitioner in *Hagen* reiterated the point in unequivocal terms:

> Before the Court today, Utah seeks a ruling that, in fact, the *boundaries* of the Uintah Valley Reservation

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[4] The *Hagen* reference map, Ex. I-1B, was reproduced as Appendix B in the Brief for Respondent State of Utah (and was also a part of the trial record in *Ute Indian Tribe v. Utah*, 521 F.Supp. 1072 (D.Utah 1981)). Br. for the Resp't at App. B, *Hagen* (No. 92-6281). This map is keyed to "original" reservation boundaries and "general land ownership." *Id.* at 6 n.3, *Hagen* (No. 92-6281). Significantly, the distinctions adopted by the panel, among fee lands, are not even depicted in the "general land ownership" designations relied on by the parties. In this respect, the *Hagen* map designated all Indian trust land as "Indian land" and all privately owned nontrust lands as "private lands," in the traditional manner.

> were *disestablished* . . . federal courts preserving the boundary of the Uintah Valley Reservation. . . . This appeal will determine whether the State of Utah criminal justice system (as opposed to federal and tribal courts) will prosecute Indians committing crimes on . . . presently owned in *fee* by non-Indians.

Reply Br. of Pet'r. at 2, 16-17, *Hagen*, (No. 92-6281) (emphasis added).

Under the holding of the panel, the "boundaries," "disestablished," and "fee" lands descriptions noted there are rendered meaningless.

At oral argument, counsel for Petitioner in *Hagen* (who also represented the Ute Tribe in the district court, the court of appeals, and before this Court in opposing certiorari in the *Ute Indian Tribe* litigation), presented the question in these terms:

> MR. SENECA: [T]he question presented is whether or not the *boundary* of the Uintah Reservation was *disestablished*. . . . MR. SENECA: . . . Now, it's couched in terms of whether or not the reservation was *disestablished*, and the reason it's couched in those terms is that if the reservation *boundary* had been *disestablished*, then Myton, Utah, is not in Indian country. . . . MR. SENECA: [T]his Court is going to have to decide whether or not that reservation *boundary* has been *disestablished* or not.

Tr. or Oral Argument at 3, 5, 9, *Hagen*, (No. 92-6281) (emphasis added).

Under the holding of the panel, the "boundary" and "disestablished" descriptions noted there are rendered meaningless.

The Counties have set forth at great length similar submissions of the Ute Tribe and the United States in *Hagen* and the substance of that documentation need not be repeated here. Pet. at 22-27. It should be sufficient to merely note that all sources confirm the same understanding of the issue presented and decided in *Hagen*.

All of this documentation is to no avail under the holding of the panel. In this instance, the panel in the Tenth Circuit is certainly mistaken. In *Hagen*, this Court did exactly what Petitioner requested, but decided that the "reservation boundary has been disestablished." *Id.*

II. THE SAME ARGUMENT SUBMITTED BY THE UNITED STATES IN THE EIGHTH CIRCUIT IN *YANKTON SIOUX TRIBE v. SOUTHERN MISSOURI WASTE MGMT.*, 99 F.3d 1439 (8th Cir. 1996), *CERT. GRANTED SUB NOM. SOUTH DAKOTA v. YANKTON SIOUX TRIBE*, 117 S.Ct. 2430 (1997) (No. 96-1581), CONFIRMS THAT THIS IS AN IMPORTANT FEDERAL QUESTION WITH UNSETTLING CONSEQUENCES THROUGHOUT THE COUNTRY.

The United States clearly understands the generic nature of this argument and the extent to which the decision of the panel in the Tenth Circuit conflicts with *Hagen* and other precedent of this Court. Although the United States has now shifted its position in this Court, the United States submitted the same argument in another case, in another circuit, not involving public domain language, but rather a statutory cession of all unallotted lands. Br. for United States as Amicus Curiae in Supp. of Plaintiffs-Appellees at 17 n.6, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996) (95-2647). In that instance, the United States candidly stated, for the first time, that its interest as *amicus curiae* was in "protecting the integrity of reservation boundaries." *Id.* at 1.

The panel in the Eighth Circuit had no occasion to squarely address the issue because it held the original boundaries of the Yankton Sioux reservation were saved by other language and not disestablished by the cession in question, as others have already pointed out in that case. Br. of Charles Mix County, South Dakota, *Amicus Curiae*, in Supp. of Pet'r, State of South Dakota at 30

n.11; Br. of Duchesne County, Utah and Uintah County, Utah, *Amici Curiae*, in Supp. of Pet'r, State of South Dakota at 2, 3-4, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581) (August 7, 1997). In addition, the State of South Dakota has correctly noted that before this Court, neither the Yankton Sioux Tribe nor the United States "now disputes" that, if *Yankton* is reversed, "Indian country" status will be limited to unextinguished allotments (18 U.S.C. § 1151(c)) and "dependent Indian communities" (18 U.S.C. § 1151(b)). Reply Br. of State of South Dakota at 20 n.19, *Yankton Sioux Tribe*, (No. 96-1581). Nevertheless, this shift in position by the United States might be prompted by the fact that a petition is still pending in this case. There is little doubt that if this petition is denied, the "post-*Hagen*" argument will be resubmitted by the United States in *other* cases. For these reasons, the argument of the United States as submitted in the Eighth Circuit raises considerable concern for *amici* States.

When *Yankton* was before the Eighth Circuit, the United States, in one sweeping footnote, submitted a modified form of the post-*Hagen* argument applied to the Yankton cession. Disregarding all disestablishment precedent, the United States summarily concluded:

> Article I of the 1892 Agreement provides only that "the unallotted lands within the limits of the [Yankton Sioux] reservation" are ceded to the United States, and it was only such lands that were covered by the Presidential Proclamation of May 16, 1895. As a result, the State's reliance on Articles I and II of the 1892 Agreement for the proposition that the Reservation was diminished can extend no further than those unallotted lands. The other lands owned by non-Indians on the Reservation presumably were once allotted to tribal members but later sold to non-Indians. The State has pointed to nothing in the 1892 Agreement to suggest that these lands were removed from the Reservation any more than that the allotted lands that remain in Indian ownership

> were removed from the Reservation. The State's argument in this case, therefore, would yield the anomalous result that some non-Indian land within the Reservation boundaries is part of the Reservation and some is not, which would complicate the jurisdictional maze beyond even that caused by the checkerboard pattern of Indian ownership. Because only Congress may alter reservation boundaries, *see Solem*, 465 U.S. at 470, the size of (and parcels constituting) the Reservation could not have been affected by subsequent transfer of lands from Indians to non-Indians.

Br. for United States as Amicus Curiae in Supp. of Plaintiffs-Appellees at 17 n.6, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996) (95-2647).

At this juncture, two important points in this argument should be noted. First, no State has ever made an argument that would support the "anomalous result" the United States has suggested. *Id.* Contrary to the assertion of the United States (without citation to any authority), the States have consistently argued in all cases, including *Hagen*, that the issue was whether the affected reservation area was "disestablished" except for "trust land." Nothing in the submissions or the decisions of *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Solem v. Bartlett*, 465 U.S. 463 (1984) or *Hagen*, can be cited to support any other conclusion. Even a cursory review of the submissions of the United States in those same cases undermines the entire argument.

Secondly, the generic nature of this argument is of critical concern. Because the operative language of all surplus land statutes, including those addressed in *Seymour, Mattz, DeCoteau, Rosebud, Solem* and *Hagen*, is always directed to only "unallotted lands," the same

argument in favor of resurrecting original reservation boundaries could be made throughout the Country—in cases already decided, as well as in future litigation. Nothing in *Hagen* supports this anomalous result.

A third point in this argument, a critical concession by the United States that, as a result, the jurisdictional maze will be complicated beyond that "caused by the checkerboard pattern of Indian ownership" is addressed *infra*. *Id.*

III. THE POSITION ADOPTED BY THE PANEL IN THE TENTH CIRCUIT HAS BEEN ACKNOWLEDGED TO CREATE UNPRECEDENTED "JURISDICTIONAL CHAOS."

In the petition, the Counties have detailed the circumstances under which the Ute Tribe previously acknowledged, before this Court, that the "jurisdictional chaos" created by this concept is unfathomable. Pet. at 10-14; ("virtually impossible") ("absurd situation") Br. of Ute Indian Tribe in Supp. of the Pet. for Reh'g at 4-5, *Hagen*, (92-6281). And the panel specifically recognized that a *title search* would be necessary to implement this unprecedented concept (involving hundreds of thousands of acres of lands in this area alone). *Ute Indian Tribe v. Utah*, 114 F.3d at 1530 (emphasis added), Pet. App. 35a. Nevertheless, the panel simply noted that "this conclusion has the benefit of producing a stable, unchanging allocation of jurisdiction." *Id.* In the process, the panel never acknowledged, discussed, or even mentioned the unprecedented "jurisdictional chaos" previously admitted by the Ute Indian Tribe.

The United States also refused to address the "jurisdictional chaos" admission. However, in the *Yankton* submission discussed *supra* at 12-15, the United States conceded the *problem*, as well as the fact that it would exist *everywhere* the argument is accepted ("complicate the jurisdictional maze beyond even that caused by the checkerboard pattern"). *Id.* In both respects these are

significant concessions insofar as the United States consistently claims that law enforcement authority and concern for effective administration of justice in Indian country are significant factors in every argument.

In addition, the panel succinctly stated that their "approach" was "more desirable" than the "moving checkerboard" (previously *approved* by this Court in *Seymour, Mattz, DeCoteau, Rosebud, Solem* and *Hagen*). *Id.* at 1530. *See also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1420-1422 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990), decided on the basis of precedent from this Court. In this light, the opinion of the Tenth Circuit is conflicting, untenable, and unworkable.

Moreover, the deficiencies and conflicts inherent in such a scheme are not resolved simply because opposing arguments have not addressed them, as will predictably be the case here. In this instance, the Court should focus on this issue and authoritatively resolve it before the consequences become unduly burdensome in former Indian country areas across the Country.

IV. THE DECISION OF THE PANEL ALSO CONFLICTS IN PRINCIPLE WITH ALL OTHER DISESTABLISHMENT PRECEDENT OF THIS COURT AND WITH EVERY CASE IN EVERY CIRCUIT THAT HAS CONSIDERED SIMILAR QUESTIONS.

Amici States are not aware of any decision anywhere that has reached a conclusion consistent with the position adopted by the courts below. We are certain that Respondents cannot cite any decision that directly supports that position. As a result, in addition to the direct conflict with *Hagen*, the decision of the panel conflicts in principle with the disestablishment precedent of this Court in the decisions of *Seymour, Mattz, DeCoteau, Rosebud* and *Solem*, as well as all related cases in every circuit (and all state decisions as well). In other words, the decision in this case is the first case in the history of this

type of litigation to leave substantial non-Indian fee lands within historic reservation boundaries, *after an area has been restored to the public domain or otherwise subject to some type of disestablishment surplus land statute.*

In this light, it is not surprising that the decision has also resulted in an intracircuit conflict. *See Yazzie*, 909 F.2d at 1420-1422 approvingly citing and quoting *DeCoteau*, 420 U.S. at 446, 447 and *Yazzie*, 909 F.2d at 1421-1422 approvingly citing and discussing *Rosebud* and *United States v. Pelican*, 232 U.S. 442 (1914). Because this intracircuit conflict relates to a recurring and important issue (*Supreme Court Practice* at 176), it too is not without significance here.

CONCLUSION

The petition for certiorari should be granted and this Court should fashion appropriate relief.

Respectfully submitted,

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No. 97-0570

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DUCHESNE COUNTY, a political subdivision of the State of Utah, and UINTAH COUNTY, a political subdivision of the State of Utah,
Petitioners,

v.

UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE OF THE STATE OF UTAH TO REQUEST FOR STATEMENT OF POSITION

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RESPONSE OF THE STATE OF UTAH TO REQUEST FOR STATEMENT OF POSITION

The State of Utah ("State"), by and through the undersigned counsel of record, submits the following statement of its position in the case described above.

BACKGROUND

The statements of the petitioning Counties and the responding Tribe concerning the history of the subject land, the pertinent statutes, and the lengthy history of litigation on

boundary and jurisdictional issues are accurate and complete and further comment by the State would not be helpful. However, an explanation of the State's past and present stance in the litigation may be useful.

In 1975 the Ute Indian Tribe ("Tribe") adopted a Law and Order Code which extended tribal jurisdiction to the entire original confines of the Uintah and Ouray Reservation. The Law and Order Code thus purported to exert tribal jurisdiction over large areas of land that had passed into non-Indian ownership subsequent to the opening of the Reservation in 1905. Also in 1975 and shortly after adoption of the Law and Order Code, litigation concerning the boundaries of the Reservation was initiated by the Tribe. In various forms and fora, the litigation has continued to the present. The State was a party defendant in the original lawsuit and has been a full participant in that suit and its progeny prior to the instant Writ filed by the Counties. The Utah Attorney General personally presented the State's case to this Court in Hagen v. Utah, 510 U.S. 399 (1994). The State also participated in proceedings subsequent to Hagen before the United States District Court for the District of Utah and the United States Court of Appeals for the Tenth Circuit.

Following the 1997 decision of the Tenth Circuit in Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997), the Utah Counties of Duchesne and Uintah chose to file the subject Petition for a Writ of Certiorari. The State, however, after carefully considering its options, chose not to seek or join in seeking such a Writ. The State's decision was not made because it was satisfied that the Tenth Circuit decision had satisfactorily or correctly resolved the matter. Rather, the State determined to address the problem through negotiation, not litigation. Twenty-two years in the courts had consumed

resources, nurtured distrust and left unanswered numerous questions which seem to have proven intractable to court-ordered remedies. The Tribe and the Counties have aptly described the present situation as one of "jurisdictional chaos," characterized by many categories of land ownership and a wide variety of unanswered jurisdictional questions. For example, just to determine jurisdiction in an arrest for criminal activity, both a survey to determine the exact location of the crime and a title search to establish the past and present ownership of the land are often necessary. Issues of civil and criminal jurisdiction are complicated by a history of mistrust and conflict in the area.

Understandably the Tribe feels an obligation to defend the historic boundaries of its Reservation even though substantial portions of the area presently consist of National Forest and lands owned by and almost exclusively populated by non-Indians. Though further litigation on the boundary and jurisdictional issues might provide some additional clarity, at the end of the day a host of practical issues, including water allocation, administration of schools, welfare of children, mental health, arrest authority, taxation, environmental regulation and wildlife management, will likely remain.

The State has not changed its position concerning the merits of the boundary litigation, but has changed its focus from litigation to negotiations. Serious negotiations between the State, Counties and Tribe began in 1994. In 1994 all of the parties signed a Memorandum of Understanding, and the following year they entered into an agreement that provides for the sharing of mineral severance taxes collected by the State from tribal trust and other lands. In 1996 the State and the Tribe signed a cooperative agreement dealing with wildlife management matters and, in September of 1997, a Child Welfare Agreement was executed. Recent discussions which

did not involve the Counties have led to the execution of a Letter of Intent, a copy of which is appended. While this document is just an "agreement to agree," it serves as a useful road map for future negotiations.

With both the State and the Tribe committed to serious negotiations, and having already made some important progress in negotiating difficult issues, the deadline for filing a Petition for a Writ of Certiorari represented a crossroads for the State. After due deliberation, the decision was made not to jeopardize the ongoing negotiations by joining in the Petition. This decision does not represent agreement with the decision of the Tenth Circuit that is the subject of the pending Petition. Rather, it represents the State's best effort to resolve the complex problems confronting the parties.

STATEMENT OF POSITION

For these reasons, the State of Utah takes no position with respect to the Counties' Petition for a Writ of Certiorari.

Respectfully submitted,

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December 23, 1997

APPENDIX

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December 23, 1997

LETTER OF INTENT

The undersigned hereby express their preliminary agreement to certain important principles, and their commitment to work together to settle remaining issues, with the objective of signing one or more agreements resolving important matters that have been troublesome and unresolved for many years.

GENERAL PRINCIPLES

1. The parties express their intention to discontinue litigation and emphasize negotiations as the preferred method of resolving disputes.

As expressed in the Memorandum of Understanding entered into in December of 1994, it is the intent of the parties hereto to pursue dispute resolution through the bargaining process, thereby contributing to a healthy, ongoing government-to-government relationship.

2. The Tribe and State recognize the legitimacy of the desire of Indian and non-Indian residents of the area to be governed by their own institutions and to be free of unnecessary interference by the other.

Major concerns identified by the parties in implementing the recent decision of the Tenth Circuit include a desire by Indians to have misdemeanor arrests on non-Reservation lands heard in Tribal Court, a desire by Indians to be free of certain otherwise applicable state taxes and a desire by non-Indians living on non-Indian fee lands within the Reservation, as defined by the Tenth Circuit, to be free of Tribal regulation.

3. The parties recognize that the effect of the recent decision of the Tenth Circuit has been to create a very difficult situation for law enforcement officers operating in the area and they desire to cooperatively provide a "seamless" system, ensuring that violations of the law are consistently and appropriately handled.

Jurisdictional issues involving law enforcement should not affect the legitimate desire of both Indian and non-Indian residents of the area to have the protection of prompt, fair and efficient law enforcement. A cooperative effort is most likely to bring about that result.

4. It is in the interest of the parties to eliminate conflicting claims to land in order to remove uncertainty and permit the land and resources located thereon to be used to the best advantage.

5. Important shared resources of the area, including water, wildlife resources and freedom from environmental degradation can best be managed on a cooperative basis.

6. A joint effort involving as many governmental parties as possible will have the best chance of arriving at comprehensive, mutually advantageous solutions to longstanding issues and obtaining necessary implementing approvals.

MATTERS WITH RESPECT TO WHICH THERE APPEARS TO BE SUBSTANTIAL AGREEMENT

Having accepted the principles set forth above, the parties have discussed at some length practical steps which can

be taken. There appears to be substantial agreement with respect to the following matters:

A. **End of Boundary Litigation.** Absent a change in controlling law, the parties accept and agree to be bound by the results of the 1997 decision of the Tenth Circuit Court of Appeals in the case of Ute Indian Tribe v. Utah, determining the present extent of the Uintah and Uncompahgre Reservations. However, acceptance of that decision does not necessarily determine the respective rights of Indians and non-Indians within the areas covered by that decision and further negotiations may be necessary to resolve those issues. In addition, the parties reserve the right to pursue litigation as a last resort, if necessary to clarify fundamental rights of residents of the area or the respective jurisdiction of the parties hereto.

B. **Cross-Deputization.** The Tribe, Bureau of Indian Affairs and State will enter into a cross-deputization agreement whereby appropriately-trained peace officers of each jurisdiction will be authorized to effect arrests or issue citations to any person suspected of violating the law on lands subject to the other entity's jurisdiction. Such arrest authority is not intended to give State officers the right to patrol Reservation land off State highways nor is it intended to give Tribal officers the right to patrol non-Reservation lands. Conservation officers who have received appropriate training will be included in the cross-deputization agreement. The parties will study provisions of the "Cooperative Agreement for Mutual Assistance in Law Enforcement" which was entered into in 1988 and will use as much as possible of that Agreement as the basis for a new agreement.

C. **Wildlife Agreement.** The parties entered into a Cooperative Agreement dealing with the management of fish and wildlife in February of 1996. The Agreement is working well and it

should be incorporated by reference in any final agreement between the parties, subject only to arriving at a workable, long-term formula or percentage that could be used in place of the number of limited entry permits on certain hunting units contained in the Cooperative Agreement.

D. Non-Interference. In order to give effect to the desire of Indian and non-Indian residents of the area to be governed by their own institutions and be free of unnecessary interference by the other, the parties agree to continue discussing and work toward agreement in the following areas:

1. Desires of the Tribe:

a. Misdemeanors. The Tribe desires that State officers refer Tribal members who are arrested for committing misdemeanors on lands that have been held to no longer be part of the Uintah Valley Reservation into Tribal Court for disposition. The Tribe understands that the State cannot commit Duchesne and Uintah County officers to do the same and that Roosevelt City is presently unwilling to entertain this idea.

b. Taxation. The Tribe has asked the State to consider alternative ways of dealing with the burden of State income taxes on Tribal members who live and work anywhere within the original exterior boundaries of the Uintah Reservation (excepting the Strawberry Reclamation Project and Gilsonite Strip withdrawals) and the Uncompahgre Reservation. The State is willing to discuss these issues but has pointed out to the Tribe that State income taxes are used to support public schools in the State and that there may be a problem giving such relief as well as supporting the Tribe's desire to have a high school operate under Tribal auspices (discussed below).

The Tribe desires to discuss an arrangement under which portions of the sales tax collected from Tribal members making purchases on lands that have been held to no longer be part of the Uintah Valley Reservation, as well as the sales tax collected from non-members of the Tribe who make purchases on Tribal trust lands, would be remitted to it. Such discussions would, of necessity, include consideration of the exact nature and extent of any such tax relief.

c. New School District. The Tribe desires the support of the State in exploring the possible creation of a school district that covers the western portion of Uintah County. Past discussions of this subject involved the possible transfer to the Tribe by the Uintah School District of all or a portion of the facilities at Todd Elementary/West Middle School for that purpose.

2. Desires of the State:

a. Civil Regulatory Jurisdiction. The State desires that the Tribe disavow regulatory authority (including zoning, licensing and environmental regulation) over land declared to be part of the Reservation under the Tenth Circuit's most recent decision in Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997) which is owned in fee by non-Indians. In seeking such a disavowal, the State recognizes that the Tribe would assert the right to assert such regulatory authority in those limited circumstances in which the Tribe is able to establish, by clear and convincing evidence, that the conduct sought to be regulated poses a direct threat to the health, safety or welfare of the Tribe or its members.

In addition, the Tribe would assert the right to exercise authority given to it under federal law to deal with the following:

(1) The issuance of Tribal permits to accompany state-issued permits authorizing the sale of alcoholic beverages.

(2) Administrative responsibilities in connection with the management of water which are given to the Tribe under terms of the Ute Water Compact.

(3) Management of hunting and fishing by mixed-bloods to the extent that they have the right to share Tribal hunting and fishing rights.

(4) Subsurface rights held in trust for the Tribe where the surface of the land is held in fee by a non-Indian.

b. Taxation. The State desires a Tribal disavowal of the authority to impose any form of tax, including, but not limited to, an income, sales or use tax, on non-Indians living or conducting business on non-Indian-owned fee lands that are within "Indian country". Such a disavowal would include any authority to collect fees or assessments (e.g. a business activity fee) from the conduct of business by non-Indians on non-Indian-owned fee lands.

E. Land Status. The status of certain lands is such that their full use and benefit is not being enjoyed. The parties desire to work together in solving these problems.

1. State School Lands. The Tribe will not challenge, or attempt to challenge, the State's ownership of those lands

identified as "school selections" within either the Uncompahgre or the Uintah Valley Reservation.

Negotiations will be undertaken with the objective of returning to Tribal ownership those "school selection" lands and mineral interests located within the Hill Creek Extension, and exchanging them for land or other assets having comparable value located outside the Hill Creek Extension.

2. **Hill Creek Minerals.** The State reaffirms the commitment set forth in the 1994 Memorandum of Understanding to work with the Tribe in seeking to obtain for the Tribe subsurface rights in the Hill Creek Extension which were retained by the United States when the surface of the lands was transferred to the Tribe in 1948.

F. **Justice System / Cultural Sensitivity.** The State has asked for certain assurances concerning the Ute Tribal Court in order to have confidence the Tribal members arrested on lands that have been held to no longer be part of the Reservation and referred to Tribal Court will be dealt with appropriately. The Tribe is willing to give such assurances and has asked in return that State law enforcement officers receive cultural sensitivity training to assist them in handling arrests of Tribal members with appropriate consideration for their unique situation.

1. **Ute Tribal Court.** The Tribe agrees to revise its Law and Order Code to provide for penalties equivalent to the penalties imposed for the same offense under State law, to the extent the Tribe is able to do so under the terms of the Indian Civil Rights Act (which limits the maximum penalty that a Tribe may impose to $5,000.00 and one year in jail).

The Tribe will improve its Tribal court system, with the employment of a full-time, law-trained chief judge and a law-trained prosecutor. Every effort will be made to safeguard the independence of the Tribal Court.

2. **Cultural Sensitivity Training**. The State agrees to provide for its law enforcement officers (and make available to officers employed by its political subdivisions in the area) on a regular basis training which includes information on proper protocol to be used in dealing with members of the Tribe, limitations on each officer's jurisdictional and cross-deputization authority, and an appreciation and understanding of matters of cultural importance.

MATTERS THAT HAVE BEEN DISCUSSED THAT REQUIRE FURTHER CONSIDERATION

The following matters have been discussed between the parties and will be further pursued with the objective of settling differences and promoting mutual governmental respect and advancement:

A. Mapping. Discussions are being conducted with BIA, BLM and other federal officials in an effort to produce maps that will be helpful to law enforcement officers and others who need to know the status of lands within the Uintah Basin. These joint efforts will continue on a cooperative basis.

B. Environmental Regulation - Uncompahgre. The Tribe believes that it is in its interest to reasonably assist the State in continuing its past role as the regulator of environmental matters on lands within the Uncompahgre Reservation.

C. **Water Issues.** The Tribe plans to present to the State its views on certain administrative issues under the Ute Water Compact. After receiving the views of the Tribe, the State is willing to consider such views in an effort to resolve matters that have delayed ratification and implementation of either of the two compacts negotiated previously.

D. **Dependent Indian Communities.** The Tribe and State agree to discuss the status of towns possibly qualifying as "dependent Indian communities" and the consequences of being so classified.

E. **Confirmation of Agreements Reached.** The Tribe and State agree to work together on necessary steps to have the agreements that they negotiate confirmed and made enforceable. These steps may include work on a stipulated order to be presented to Judge Jenkins, necessary Tribal and State legislative changes and jointly seeking Congressional approval.

F. **Other Matters.** The Parties have identified other matters that they feel may be appropriate for future joint consideration:

1. **Other Jurisdictional Issues.**

   a. Enforcement of family support orders.

   b. Full faith and credit.

   c. Service of process.

   d. Extradition.

2. **Law Enforcement.**

a. Hot pursuit situations crossing jurisdictional lines.

b. Patrolling roads that cross jurisdictional lines.

c. Matters that are not being dealt with adequately at present e.g. spousal abuse and concerns about the role of the U.S. Attorney in connection with misdemeanors.

3. **Support of Legislation to Eliminate Termination Provisions.** The State is willing to work with the Tribe in seeking the elimination of language in the Ute Partition Act which calls for eventual termination of federal recognition and supervision of the Tribe.

MATTERS TO BE FINALIZED IN SUBSEQUENT AGREEMENTS

The Tribe and the State recognize that the commitments contained herein are preliminary and that final resolution of the matters identified in this Letter of Intent will require substantial discussion and negotiation. As negotiations on each matter are concluded, the parties shall, as appropriate, enter into an agreement(s) which sets forth the final commitments and binding obligations of the State and Tribe or seek ratification of the negotiated settlement by Congress.

By signing below the parties hereto publicly acknowledge their commitment to work cooperatively toward the completion of definitive agreements resolving the important issues set forth above.

UTE INDIAN TRIBE

By_____

STATE OF UTAH

By_____

(6)

No. 97-570

FILED
JAN 5 1998
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DUCHESNE COUNTY, a political subdivision of the State of Utah, UINTAH COUNTY, a political subdivision of the State of Utah,
Petitioners,

v.

UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah, a federally recognized tribe of Indians,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY TO RESPONSE OF THE STATE OF UTAH

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PETITIONERS' REPLY TO RESPONSE OF THE STATE OF UTAH

Pursuant to the direction of the Court by letter dated November 24, 1997, the Office of the Clerk requested that the State of Utah file a response to the petition for a writ of certiorari in this case (although aligned with the Counties below, the State had previously waived the right to respond). On December 23, 1997, the State filed a "RESPONSE OF THE STATE OF UTAH TO REQUEST FOR STATEMENT OF POSITION." Petitioners' Reply to the Response of the State of Utah is submitted pursuant to Sup. Ct. R. 15.6.

INTRODUCTION

A. The Response of the State of Utah Confirms the State's Disagreement With the Decision of the Tenth Circuit Court of Appeals.

As a preliminary matter, it should first be noted that in its response, the State of Utah does not back away, in any respect, from the diminishment/disestablishment arguments the State submitted in the district court and in the court of appeals:

> The State's decision was *not* made because it was satisfied that the Tenth Circuit decision had *satisfactorily* or *correctly* resolved the matter. . . . The State has *not* changed its position concerning the merits of the boundary litigation. . . This decision does *not* represent agreement with the decision of the Tenth Circuit that is the subject of the pending Petition.

Resp. of the State of Utah to Req. for Statement of Position at 2, 3, 4, *Duchesne County and Uintah County, Utah v. Ute Indian Tribe*, (No. 97-570) (emphasis added) (hereinafter Resp. of Utah).

In other words, the State of Utah continues to recognize the unworkable and unprecedented nature of the decision of the Tenth Circuit Court of Appeals, that it is in direct conflict with the decision of this Court in *Hagen v. Utah*, 510 U.S. 399 (1994), and that *Hagen* did not

hold, as the court of appeals erroneously concluded, that historic reservation boundaries still exist in spite of the "restoration to the public domain" language of the Uintah Acts, so as to encompass tens of thousands of acres of fee lands that are not owned or populated by members of the Ute Indian tribe. In this respect, to the extent that the Counties have consistently relied upon the same analysis and authorities as the State of Utah, the response undeniably *substantiates* the arguments set forth in the petition—in spite of taking "no position" on the petition because of other competing interests.[1]

For this reason, and to further insure that the arguments of the State of Utah receive consideration in the context in which they were originally submitted, the Counties, for the convenience of the Court, have appended in their entirety the motions and briefs that the State of Utah submitted in the court of appeals. Reply to Resp. App. 1a-88a. The documents make perfectly clear the "position" of the State referred to in the response, which has "not changed." Resp. of Utah at 3. The arguments support the historic reservation boundary disestablishment recognized in *Hagen*. On the merits, these arguments also support the Counties' petition in *every* respect. The significant aspects of the State's arguments are cited in Argument I *infra*, and briefly discussed in Argument II, *infra*.

B. The Response of the State of Utah Specifically Confirms That Future Negotiations Were Not Intended to Affect the Compelling Reasons for Granting the Petition for a Writ of Certiorari in this Case.

The fact that the State has agreed to a "road map for future negotiations" does not detract from any of the reasons previously submitted in support of the petition for a writ of certiorari in this case. *Id.* at 4. Nor was it

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[1] The brief of *amici* States similarly supports this petition. Br. for the States of California, *et al.* as *Amici Curiae* in Supp. of Pet'rs, *Duchesne County and Uintah County, Utah v. Ute Indian Tribe*, (No. 97-570).

intended to do so. As the "road map" itself attests, the opposite is true with reference to this petition and specifically to the decision of the Tenth Circuit Court of Appeals. Resp. of Utah App. at 3a. To allow for this contingency, the "road map" is prefaced by the express disclaimer: "Absent a change in controlling law. . . ." *Id.* This petition can and should lead to that change in controlling law.

In addition, the "road map" also disclaims any intent to "necessarily determine the respective rights of Indians and non-Indians within the areas covered by that decision." *Id.* And finally, the right to "pursue litigation as a last resort" to clarify the "fundamental rights of residents of the area or the respective jurisdiction of the parties" was also explicitly acknowledged. *Id.* As a result, even if the Counties had been a part of this process (and they were not, as the State appropriately points out) nothing in the process adopted by the State of Utah undermines the need for the relief requested in this petition. Resp. of Utah at 3-4.

Moreover, as a practical matter, the State's response *affirmatively* establishes the need for this Court to exercise its discretionary jurisdiction in this case. It does so by confirming in no uncertain terms the "jurisdictional chaos" that will result if the Tenth Circuit's decision is allowed to stand:

> The *Tribe* and the *Counties* have *aptly* described the present situation as one of "*jurisdictional chaos*," characterized by *many* categories of land ownership and a wide variety of unanswered jurisdictional questions. For example, just to determine jurisdiction in an arrest for criminal activity, both a *survey* to determine the exact location of the crime *and* a *title search* to establish the *past* and *present* ownership of the land are often necessary.

Id. at 3 (emphasis added).

As all parties acknowledge, the scope of this problem is truly "monumental." Tr. of Ct. Proceedings at 10, *Ute Indian Tribe v. Utah*, (Oct. 21, 1997) (No. 75-CV-408-J); Reply App. at 3a. In light of the hundreds of thousands of acres involved in this "jurisdictional chaos" area, appropriate relief from this Court is clearly warranted.[2]

In the final analysis, there is not even a suggestion here that the State's approach can realistically resolve any of the substantial questions in this area in the foreseeable future. It is for this reason that the Counties have sought and relied upon the proper application of the rule of law in this case—a rule of law that has been applied in all similar diminishment/disestablishment areas in the past, *without* exception and *without* substantial complications. The Tenth Circuit should have implemented this rule of law. *See* discussion of *Hagen* in Pet. at 20-22 (No. 97-570). *See also DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 (1977) and all related decisions premised on a similar "*pro tanto*" disestablishment of historic reservation boundaries around areas directly affected by similar legislation.

Moreover, the Counties can certainly understand the "desires" of the Ute Indian tribe in seeking by negotiation a recognition of special exemptions and other special treatment throughout the entire area for all tribal members, treatment reserved to tribal members within Indian reservations. Resp. of Utah App. 4a-5a. However, the Counties cannot understand how the State of Utah or Congress could constitutionally confer that special recog-

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[2] The federally funded and tribally assisted tract by tract *title* opinions and corresponding *mapping* processes, involve "28" different land categories and hundreds of thousands of acres of land. No one can accurately predict when such a project will be complete. *See also* the related argument set forth in the brief of *amici* States, Br. for the States of California, *et al.* in Supp. of Pet'rs at 12-15, *Duchesne County and Uintah County, Utah v. Ute Indian Tribe* (No. 97-570).

nition on Ute tribal members in areas that this Court has held are no longer part of the Uintah reservation, as even the Tenth Circuit has recognized. For this reason, in part, the Counties have not participated in this aspect of the "road map" process.[3]

Of course, this is not to say that the process itself is not appropriate and certainly commendable to resolve many of the other conflicts that confront the Ute Indian tribe, the State of Utah and the Counties in the area in question. In those instances, the Counties have always welcomed the opportunity to resolve differences in this fashion.

ARGUMENT

I. THE SPECIFIC ARGUMENTS SUBMITTED BY THE STATE OF UTAH IN THE TENTH CIRCUIT UNEQUIVOCALLY SUPPORT THE HISTORIC RESERVATION BOUNDARY DISESTABLISHMENT RECOGNIZED IN *HAGEN*.

The State of Utah has consistently supported the historic reservation boundary disestablishment recognized in *Hagen*. For this reason, as noted *supra*, the Counties have appended the briefs and motions submitted by the State of Utah in the Tenth Circuit in their entirety. Reply to Resp. App. 1a-88a. A few references to these documents demonstrate the extent of that support. For example, see Br. of Appellant State of Utah, at 8 (App. 19a), 12 (App. 23a), 26 (App. 38a), 30 (App. 42a-43a), 31 (App. 43a), 34 (App. 47a), 40 (App. 53a), 43 (App. 56a), 44 (App. 57a), 49 (App. 62a), *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997) (No. 96-4073). *See also* Reply Br. of Appellant State of Utah at 10 (App. 78a), 11 (App. 79a), 12 (App. 80a), 13 (App. 81a), 17 (App. 85a), *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997) (No. 96-4073).

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[3] On December 10, 1997, similar questions regarding the scope of the plenary power of Congress in this respect were briefly raised during oral argument. Tr. of Oral Argument at 10, 19-21, 39-40, 55, *Alaska v. Native Village of Venetie*, (No. 96-1577).

II. THE COUNTIES RECOGNIZE THAT THE SCOPE OF DIMINISHMENT/DISESTABLISHMENT SET FORTH IN THE CASE LAW IS AT TIMES UNCLEAR AND CONFUSING; NEVERTHELESS, THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS DIRECTLY CONFLICTS WITH *HAGEN* AND CONFLICTS IN PRINCIPLE WITH ALL RELATED RESERVATION DIMINISHMENT/DISESTABLISHMENT PRECEDENT.

In the references noted *supra*, the State of Utah did not always use the terms "diminished/disestablished" as words of art. But that is also true of the other parties and the courts that have been involved in this and all other similar litigation. The Tenth Circuit failed to recognize this fact and the fundamental error of that court centers around a misconstruction of the diminishment/disestablishment holding in *Hagen*.

Ignoring that prior precedent from this Court has always recognized that all types of diminishment/disestablishment statutes extinguish historic reservation boundaries, the court of appeals found that the *Hagen* opinion did not support that conclusion. Emphasizing an alleged difference between "diminished" and "disestablished" in the text of the *Hagen* opinion, and focusing on an alleged limitation in the public domain description in the *Hagen* opinion that only referenced lands directly affected ("with respect to those lands"), the court of appeals misconstrued *Hagen*. *Hagen*, 510 U.S. at 414. *Hagen* did *not* hold that the boundaries of the historic Uintah Reservation were somehow also *modified* to *exclude* only those lands actually restored to the public domain and, at the same time, *modified* to *include* all other lands, as the court of appeals has decided.

The fact that such a holding would have been completely unprecedented and in conflict with the decisions cited and relied on as precedent in *Hagen*, was not given due consideration and received no mention in the court of appeals' opinion. The State of Utah had stressed this

point. Reply to Resp. App. 43a. The holdings in *DeCoteau* (disestablished) and *Rosebud* (diminished) attest that in *both* instances the historic boundaries around the areas affected were *necessarily disestablished*. In addition, as the State of Utah also noted, any contrary holding in this case would not only have to ignore that precedent, but it would also have to ignore the understanding of that precedent evidenced by the specific submissions of the parties in *Hagen*: namely, that federal and tribal jurisdiction would be limited to *trust* land in the event that diminishment/disestablishment was found. *Id.* at 23a.

Moreover, the holding of the Tenth Circuit could not possibly be correct even if one were to assume *arguendo* that *Hagen* only decided the non-reservation status of the lands specifically restored to the public domain (and not the status of the lands that remained). Precedent (*DeCoteau* and *Rosebud*) establishes that non-reservation status of the restored lands in all instances is *necessarily* tied to the disestablishment of historic reservation boundaries and *Hagen* relied on that precedent. Even if *Hagen* was not intended to also resolve the status of the other lands that remained, it certainly cannot be maintained that *Hagen* intended *diminishment* in the *unprecedented* format adopted by the court of appeals. Nevertheless, this is what the court of appeals has erroneously decided that *Hagen held*. The State of Utah strongly disagreed with this view of *Hagen*. *Id.* at 42a-45a.

The operative language of Uintah legislation restored all unallotted lands to the public domain and thereby extinguished historic reservation boundaries. *Id.* at 43a. In such a situation, the allotted lands in the area ordinarily would no longer be within the limits of an Indian reservation (18 U.S.C. 1151(a)), contrary to what the court of appeals has held (based on an incorrect view of the *holding* in *Hagen* purportedly directed to the status of these "other" lands). Rather, Congress intended that 18 U.S.C. 1151(c) apply in that instance. See *United States*

v. Pelican, 232 U.S. 442 (1914) and the revisor's notes to 18 U.S.C. 1151(c). Nothing in *Hagen* even suggests that this analysis was *not* applicable in the context of the Uintah legislation. And the mere fact that Congress provided for a Uintah "grazing" reserve at the same time (not a "diminished reservation") could not affect the "reservation" status of the allotments in any event. Reply to Resp. App. 56a.

While there might have been some general questions when this Court had an opportunity to address the consequences of similar diminishment/disestablishment legislation in oral argument in *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581) there was no misunderstanding on this point. Although it was noted that the dissent in *Yankton* in the court of appeals even said that the reservation in question was only "diminished," the parties made clear (and so did the United States) that the issue in *Yankton* was really one of reservation disestablishment. Tr. at 4-6, 23, 25, 27, 32, 33, 34, 39-41, 49-50, *Yankton Sioux Tribe* (No. 96-1581).[4] In *Hagen*, the parties submitted the case with that same understanding, as the State of Utah pointed out. Reply to Resp. App. 56a.

In *Yankton*, as in this case, the scope of the cession (or the restoration) was not restricted so as to exclude a discrete area of the original reservation that Congress intended to maintain as a "diminished" reservation. As a result, *DeCoteau* establishes that the entire historic reservation boundary was disestablished.[5]

The maps submitted in both *Hagen* and *DeCoteau confirm* this understanding and analysis. In *Hagen*, the State of Utah submitted a reference map. As *amici* States point

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[4] Nevertheless, diminished and disestablished were sometimes used interchangeably even in this argument. Tr. at 49-50, *Yankton Sioux Tribe* (No. 96-1581).

[5] *Rosebud* confirms that holding insofar as it relates to historic boundaries around areas other than the "diminished" reservation.

out, the map, coded to trust land, makes sense only in this context. Br. for States of California, *et al.* at 10, n. 4 (No. 97-570). *See also* Pet. at 18 (No. 97-570). In *DeCoteau*, the United States prepared and appended a special diagram from a more detailed Bureau of Indian Affairs map that illustrated the same point. Br. U.S. at 7 n. 2, *DeCoteau* (No. 73-1148). As the United States explained in oral argument:

> MR. SACHSE: . . . Indian country is any land inside a reservation. If this Court were to hold this reservation had been abolished by the 1891 Act, which I think would be a very restrictive and artificial interpretation of what the Court's done in *Mattz* and in *Seymour vs. Superintendent*, and I think it would also undercut 18 U.S.C. 1151 seriously. At least for this reservation.
>
> QUESTION: Yes, but go ahead. If the Court should hold—
>
> MR. SACHSE: If the Court should hold that, then each one of these red spots is a *little island of federal and tribal jurisdiction*, and we're not in a time now when these—
>
> QUESTION: That's the way it's been, isn't it, as my brother White suggested?

Tr. at 21, *Erickson v. United States ex rel. Feather*, 420 U.S. 425 (1975) (No. 73-1500) (emphasis added).

In Utah that is the way it had been until the Tenth Circuit altered the status quo. *Hagen*, 510 U.S. at 414-415. And that is the way the United States told this Court it would be again, if the Utah Supreme Court was affirmed in *Hagen*. *Hagen* affirmed the Utah Supreme Court, but the decision of the Tenth Circuit does not reflect that holding.[6]

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[6] One additional point is noteworthy in this regard. The United States District Court in Utah has continued to enjoin the Counties from implementing the *Hagen* mandate. Reply Br. of Pet'rs at 1-3 (No. 97-570).

CONCLUSION

In the Petition, the Counties requested that the Petition for a Writ of Certiorari be granted and for the Court to fashion some type of appropriate relief. Alternatively, we suggested that consideration of the Petition be deferred until after this Court had an opportunity to view the issue in light of the briefing and oral argument in *South Dakota v. Yankton Sioux Tribe*, (No. 96-1581) (Monday, December 8, 1997). Because the United States elected not to express its views to this Court regarding the Tenth Circuit's construction of *Hagen*, we further suggested in our Reply Brief that the United States be invited to do so. Now that the State of Utah has clarified its role in this litigation, we respectfully submit that the United States, at the very least, should explain how it could tell this Court one thing in *Hagen* and then tell the court below a different story.

Respectfully submitted,

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January 5, 1998

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-4073

UTE INDIAN TRIBE of the Uintah and Ouray Reservation, Utah,
Plaintiff/Appellee,

v.

STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,
Defendants/Appellants,

UNITED STATES OF AMERICA,
Amicus Curiae.

MOTION TO RECALL MANDATE AND REQUEST FOR SUSPENSION OF RULES

MOTION TO RECALL MANDATE

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Appellants State of Utah, Duchesne and Uintah Counties, and the Cities of Roosevelt and Duchesne, hereby move to recall the mandate issued on December 5, 1986, subsequent to the *en banc* decision of this Court in *Ute Indian Tribe v. State of Utah, et al.*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S.

994 (1986),[1] and to remand the case to the United States District Court for the District of Utah with instructions to give full force and effect to the decision of the United States Supreme Court in the case of *Hagen v. Utah*, 510 U.S. ——, 114 S.Ct. 958 (1994). The *Hagen* decision directly conflicts with the *en banc* decision of this Court. Grounds for this Motion are as follows:

1. This case is one of a long series of related State and Federal suits dealing with the present extent of the reservation and jurisdiction of the Ute Indian Tribe. In 1993, the United States Supreme Court granted *certiorari* for the specific purpose of resolving a conflict between the *en banc* decision of this Court in *Ute Indian Tribe, supra,* and a decision of the Utah Supreme Court in *State of Utah v. Perank*, 858 P.2d 927 (Utah 1992). Writing for a seven-justice majority of the United States Supreme Court, Justice O'Connor stated:

> We granted certiorari, 507 U.S. 1028 (1993), to resolve the direct conflict between these decisions of the Tenth Circuit and the Utah Supreme Court on the question whether the Uintah reservation has been diminished.

2. In the *Hagen v. Utah* decision, the United States Supreme Court affirmed the decision of the Utah Supreme Court and held that the Uintah Valley Reservation had been diminished when unallotted land therein was "restored to the public domain" and opened for non-Indian settlement by Congress.

3. Thereafter, in renewed proceedings brought by the Tribe in the present case before the United States District Court for the District of Utah, the District Court considered itself bound by the mandate issued by this Court

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[1] In a letter written to the Clerk of the United States District Court for the District of Utah by the Clerk of the United States Court of Appeals for the Tenth Circuit dated December 5, 1986, the opinion of the Court of Appeals was deemed to constitute the mandate.

following its 1985 *en banc* decision and unable to give full effect to the later *Hagen v. Utah* decision. In a Memorandum Decision and Order entered on April 2, 1996, the District Court discussed the possibility of a motion to recall this Court's mandate (pp. 79-81) because of the significant change made in the controlling law by *Hagen v. Utah*. And, because no party had theretofore filed a motion to recall this Court's mandate, the District Court *sua sponte*, on April 22, 1996, prepared and filed with this Court a Certificate and Request for Further Instructions concerning the conduct of further proceedings in the case. On page 4 of its Certification and Request, the District Court invited this Court to recall its mandate.

4. By this Motion, Appellants agree that this Court should recall and reconsider its mandate in light of *Hagen*.[2] Movants are caught between the jurisdiction-expanding mandate of the United States Supreme Court in *Hagen v. Utah* and the inconsistent, jurisdiction-narrowing decision of the U.S. District Court. The District Court's further review of the matter has delayed by more than two years full implementation of the mandate of the United States Supreme Court restoring State civil and criminal jurisdiction over land held to no longer be part of the Uintah Valley Reservation.

5. This Court recently discussed the impact of the *Hagen v. Utah* decision of the Supreme Court on the holding in this case. In *United States of America v. Cuch*, 79 F.3d 987 (10th Cir. 1996), the Court stated that:

> The *Hagen* decision effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, redefined the Reservation boundaries resulting from

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[2] We would further suggest that the simplest solution to this problem would be for the Court to reinstate the original three-judge panel decision in *Ute Indian Tribe v. State of Utah, et al.*, 716 F.2d 1298 (10th Cir. 1983), which we believe is fully consistent with the decision of the United States Supreme Court in *Hagen* and subsequent decisions of this Court.

our earlier decision, and conclusively settled the question.

Further, as noted in the *Hagen v. Utah* decision, the correctness of this Court's earlier decision in this case was also called into question by a panel of this Court in *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400 (10th Cir. 1990).

REQUEST FOR SUSPENSION OF RULES

Pursuant to Rule 2 of the Federal Rules of Appellate Procedure, and to avoid repetitive and unnecessary briefing, Movants request that this Motion be consolidated with and considered in connection with the other matters which are before the Court in this case, including the District Court's Certificate and Request for Further Instructions and Movants' appeal of the District Court's Order granting injunctive relief. The same issues are before the Court in three different contexts, and the interests of judicial economy will be served by directing that all three be briefed and considered together. Pursuant to an Order entered by the Court, this case will be considered on an expedited basis, with arguments to be heard during the September 1996 Session.

Respectfully submitted this 12th day of June, 1996.

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-4073

UTE INDIAN TRIBE of the Uintah and Ouray Reservation, Utah,
Plaintiff/Appellee,

v.

STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,
Defendants/Appellants,

UNITED STATES OF AMERICA,
Amicus Curiae.

SUGGESTION FOR CONSIDERATION *EN BANC*

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Appellants State of Utah, Duchesne and Uintah Counties, and the Cities of Roosevelt and Duchesne, respectfully suggest that the matters before the Court in connection with this case [1] be considered *en banc*. The grounds for this suggestion are as follows:

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[1] As of now, the matters before the Court are the District Court's Certification and Request for Instructions and the Appeal pursuant to 28 U.S.C. § 1292(a). However, within the next few days Appellants will also be filing a Motion to Recall the Mandate of this Court issued on or about December 5, 1986.

1. Counsel for Appellants express a belief based on a reasoned and studied professional judgment that the *en banc* decision of this Court in *Ute Indian Tribe v. State of Utah, et al.*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986), is contrary to the subsequent decision of the United States Supreme Court in *Hagen v. Utah*, 510 U.S. ——, 114 S.Ct. 958 (1994), and has been effectively overruled by that decision. Further, the 1986 *en banc* decision of this Court in *Ute Indian Tribe* is now inconsistent with subsequent panel decisions of this Court (*see, e.g., Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990); *Gardner v. U.S.*, Case No. 93-4102, unpublished opinion dated May 5, 1994 at 5, n.4; and *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), and consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court.

This Appeal and the Certification and Request for Instructions by the District Court are the latest incarnations of a cases filed by the Ute Indian Tribe in 1975 in an effort to re-establish tribal jurisdiction over all lands located within the original exterior boundaries of the Uintah and Uncompahgre Reservations. The controversy over whether the original exterior reservation boundaries survived the opening of the respective reservations has bounced between various state and federal courts for years with inconsistent outcomes. In 1993, the United States Supreme Court granted *certiorari* to resolve the conflicting decisions (507 U.S. 1028).

The recent decision of the U.S. District Court, in failing to give full effect to the Supreme Court's decision in *Hagen*, has continued the turmoil, polarization and uncertainty on the part of Indian and non-Indian residents of the area, as well as State and Federal law enforcement officers and lower State and Federal Courts.

An authoritative *en banc* decision of this Court giving effect to the United States Supreme Court's decision in *Hagen v. Utah, supra,* is needed so that Indian and non-Indian residents of the area will finally know where they stand.

2. In its decision of April 2, 1996, the United States District Court for the District of Utah feels bound by the mandate issued following the 1985 *en banc Ute Indian Tribe* decision of this Court notwithstanding the subsequent decision of the Supreme Court in *Hagen.* It has prepared and filed with this Court a Certificate and Request for Further Instructions in which it invited this Court to recall its mandate. It seems logical to Appellants that the question of recalling the mandate issued following an *en banc* decision should be considered by the Court *en banc.* While awaiting a decision of this Court, the District Court issued a broad injunction which includes, among other things, language prohibiting State prosecution of misdemeanor cases involving members of the Ute Indian Tribe or members of other federally-recognized Indian tribes in the disputed area. This injunction flies in the face of the *Hagen* decision and is preventing full implementation of that decision and the mandate issued by the United States Supreme Court. It is from this broad injunction that Appellants have filed their appeal. The injunction issued by the District Court has also created an unseemly conflict between the State and Federal judicial systems which we believe was the very reason the United States Supreme Court granted *certiorari.*[2]

3. Counsel for Appellants here express a belief based on a reasoned and studied professional judgment that this appeal and related matters now before this Court involve the following questions of exceptional importance:

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[2] Even the United States, through the Solicitor General, urged the Supreme Court to grant *certiorari* to put to rest the continuing conflict.

a. Whether this Court's *en banc* opinion and mandate in *Ute Indian Tribe v. State of Utah,* 773 F.2d 1087 (1985), *cert. denied,* 479 U.S. 994 (1986), are to be given continued effect in light of the decision of the United States Supreme Court in *Hagen v. Utah,* 510 U.S. ——, 114 S.Ct. 958 (1994), and subsequent panel decisions of this Court (*Pittsburg & Midway Coal Mining Co. v. Yazzie,* 909 F.2d 1387 (10th Cir. 1990), *cert. denied,* 498 U.S. 1012 (1990); *Gardner v. U.S.,* Case No. 93-4102, unpublished opinion dated May 5, 1994 at 5, n.4; and *United States v. Cuch,* 79 F.3d 987 (10th Cir. 1996). The U.S. District Court for Utah has failed to do so, thereby frustrating the implementation of the mandate of the United States Supreme Court in *Hagen.*

b. The extent to which the original boundary of the Uintah Valley Reservation was diminished, which occurred as a result of Congress' restoring the unallotted lands thereof to the public domain and opening them for homesteading.

c. In the aftermath of *Hagen v. Utah,* what is the jurisdictional status of all lands not currently held in trust by the United States for the benefit of the Ute Indian Tribe or its members, within the original Uintah and Uncompahgre Reservations?

d. The jurisdictional status of the approximately 1.1 million acres of land within the original reservation boundaries which Congress restored to the public domain and were then added to the Ashley National Forest by Executive Order in 1905.

e. In light of the rationale announced by the United States Supreme Court in *Utah v. Hagen, supra,* whether the original Uncompahgre Reservation boundaries remain intact, when the lands within that Reservation (with the exception of a few minor allotments) were restored to the public domain and opened to homesteading.

f. Whether certain allotments which were originally part of the Uintah Valley Reservation at the time of its opening in 1905, but which have subsequently passed into non-Indian ownership and are no longer held in trust by the United States, are still "Indian country."

Respectfully submitted this 12th day of June, 1996.

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Court of Appeals Case No. 96-4073
District Court No. C 75-408J

No. 96-4073

UTE INDIAN TRIBE of the Uintah and Ouray Reservation, Utah,
Plaintiff/Appellee,

v.

STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,
Defendants/Appellants,

UNITED STATES OF AMERICA,
Amicus Curiae.

(Oral Argument Requested)

On Appeal from the United States District Court
for the District of Utah,
Honorable Bruce S. Jenkins, Senior Judge

BRIEF OF APPELLANT STATE OF UTAH

STATEMENT OF JURISDICTION

1. *District Court Subject Matter Jurisdiction.*

This is an action brought by an Indian tribe in which the matter in controversy arises under the laws of the United States. The District Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1362.

2. *Appellate Jurisdiction.*

This appeal is brought pursuant to 28 U.S.C. § 1292 (a)(1) from the April 2, 1996 Memorandum Decision and Order of the United States District Court for the District of Utah, Central Division, continuing in effect, as modified, the District Court's Order dated September 3, 1992 enjoining the State of Utah and its political subdivisions from the exercise of civil and non-felony criminal jurisdiction over Indians within the former boundaries of the Uintah and Ouray Indian Reservation, as those boundaries were set by the U.S. Court of Appeals for the Tenth Circuit in *Ute Indian Tribe v. State of Utah,* 773 F.2d 1087 (10th Cir. 1985) (*en banc*), cert. den. 479 U.S. 994 (1986) ("*Ute Indian Tribe*").

28 U.S.C. § 1292(a) provides in relevant part that the courts of appeal shall have jurisdiction of appeals from "[i]nterlocutory orders of district courts of the United States . . . continuing, modifying . . . or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." See *Casey v. Planned Parenthood,* 14 F. 3d 848, 854-855 (3rd Cir. 1994).

This appeal was brought by defendants State of Utah; Duchesne County, Utah; Uintah County, Utah; Roosevelt City; and Duchesne City (collectively the "Appellants" or the "State and Local Defendants"). Appellants' Notice of Appeal was timely filed with the District Court on April 12, 1996.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court commit error by continuing to enjoin the State of Utah and its political subdivisions from exercising jurisdiction anywhere within the former boundaries of the Uintah and Ouray Reservation, after the decision of the U.S. Supreme Court in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L. Ed. 2d 252 (1994) ("*Hagen*") that the reservation had been diminished by Congress?

2. After *Hagen* became final, what, if any, was the preclusive effect of this Court's mandate and opinion in *Ute Indian Tribe?*

3. Should this Court recall its mandate to the District Court in *Ute Indian Tribe*, and issue a new mandate to the District Court fully consistent with *Hagen* and other intervening law?

4. Did the District Court commit error in concluding that the only effect of *Hagen* within the Uintah Reservation was to remove from Indian country "on allotted and unreserved lands of the Uintah Reservation that were opened to entry in 1905, to the extent that those lands were not later restored to tribal ownership"?

STATEMENT OF THE CASE

1. *Nature of the Case.*

This appeal is taken pursuant to 28 U.S.C. § 1292 (a)(1) from the April 2, 1996 Memorandum Decision and Order (the "Memorandum Decision") of the United States District Court for the District of Utah, Hon. Bruce S. Jenkins District Judge, continuing in effect, as modified, his Order dated September 3, 1992 (the "Injunction Order"), enjoining the State of Utah and its political subdivisions from the exercise of civil and non-felony criminal jurisdiction over Indians within the former boundaries of the Uintah and Ouray Indian Reservation, as

those boundaries were set by the U.S. Court of Appeals for the Tenth Circuit in *Ute Indian Tribe*. Aplt. App. Tab G, p. 265. Concurrently with this appeal, appellants have moved the Court of Appeals pursuant to Rule 27, Fed. R. App. P. for an Order recalling the mandate in *Ute Indian Tribe*, and issuing a new mandate fully consistent with *Hagen*.

2. *Course of Proceedings.*

This action was originally commenced in 1975 by plaintiff Ute Indian Tribe (the "Ute Tribe" or the "Tribe") "seeking declaratory and injunctive relief establishing the exterior boundaries of the Uintah and Ouray Reservation, defining the force and effect of the Tribe's Law and Order Code within those boundaries, and restraining the defendants from interfering with the enforcement of that Code." *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1075 (D. Utah 1981). The District Court, Jenkins, J., ruled that the former Uintah Reservation had not been diminished by Congress at the time the reservation was legislatively opened to non-Indian settlement in 1905, and that all lands within the current reservation boundaries constituted Indian country pursuant to 18 U.S.C. § 1151(a). Id., 521 F. Supp. at 1153-1154. However, the District Court held that approximately 1,010,000 acres of land within the original reservation boundaries that had been added to the Uintah Forest Reserve (now the Uinta and Ashley National Forests) at the time of the 1905 opening had been removed from the reservation. Id. The District Court also ruled that the related Uncompahgre Reservation had been disestablished by Congress in 1897 and no longer existed in any form. Id.

On appeal by the Tribe, the majority of a three judge panel of the United States Court of Appeals for the Tenth Circuit affirmed Judge Jenkins' ruling that the national forest lands had been removed from the Uintah Reservation and the Uncompahgre Reservation disestablished, but

reversed his decision concerning the main body of the Uintah Reservation, and held that that reservation had been diminished for jurisdictional purposes. *Ute Indian Tribe v. State of Utah,* 716 F. 2d 1298 (10th Cir. 1983). On rehearing *en banc,* the Court of Appeals changed course and ruled in favor of the Tribe on all three issues, finding the Uncompahgre reservation still extant, and the Uintah Reservation intact with the national forest lands within its current boundaries. *Ute Indian Tribe, supra,* 773 F. 2d 1087.

In 1992, the Utah Supreme Court ruled in two related criminal cases that the original boundaries of the Uintah Reservation had been diminished when Congress opened the reservation to non-Indian settlement in the early 1900s. *State v. Hagen,* 858 P.2d 925 (Utah 1992) ("*State v. Hagen*"); *State v. Perank,* 858 P.2d 927 (Utah 1992) ("*Perank*"). As a consequence, the Court held that the State had properly asserted criminal jurisdiction over the Indian defendants because the loci of their crimes, although within the original exterior boundaries of the reservation, were outside "Indian country" as defined in 18 U.S.C. § 1151.

The United States Supreme Court granted a writ of certiorari "to resolve the direct conflict" between the decisions of the Tenth Circuit in *Ute Indian Tribe* and of the Utah Supreme Court in *Hagen* and *Perank.* In *Hagen v. Utah,* 510 U.S. 399, 114 S.Ct. 958, 127 L. Ed. 252 (1994), the U.S. Supreme Court affirmed the Utah Supreme Court's decision, holding that the Uintah Reservation had been diminished by Congress, and permitting the exercise of state jurisdiction within the former boundaries.

On August 3, 1992, after the Utah Supreme Court's slip opinions had been released in *Hagen* and *Perank* but prior to the grant of certiorari by the U.S. Supreme Court, the Ute Tribe reopened this case by filing a motion in the District Court for injunctive relief against the state pursuant to a claimed exception to the Anti-Injunction Act,

28 U.S.C. § 2283. Aplt. App. Tab E., pp. 26-27. The Tribe's motion sought to permanently enjoin the Utah Supreme Court from entering as final its decision in those cases, and to enjoin the State and its political subdivisions from enforcing or relying upon those decisions in any way. Id. The Tribe simultaneously sought a temporary restraining order or preliminary injunction having the same effect. Aplt. App. Tab B, pp. 10-15.

On August 31, 1992, the State and Local Defendants and the Ute Tribe, through counsel, entered into a stipulation for the entry of injunctive relief pending the decision of the District Court on the Ute Tribe's motion for permanent injunctive relief. The stipulation by its terms expires on the day after the District Court issues its decision on the Tribe's motion for injunctive relief. Aplt. App. Tab F, pp. 31-33. The District Court issued an Order (the "Injunction Order") incorporating the parties' stipulation concerning injunctive relief, on September 3, 1992, *nunc pro tunc* to August 2, 1992. Aplt. App Tab F, pp. 28-30.

In the ensuing months the District Court vacated several previously scheduled hearings on the Tribe's motion for injunctive relief pending the U.S. Supreme Court's consideration of the certiorari petition in *Hagen*, and subsequently pending the Supreme Court's decision on the merits. See Docket Sheet, Aplt. App. Tab B. On February 23, 1994, the U.S. Supreme Court issued its decision in *Hagen* affirming the decision of the Utah Supreme Court in *State v. Hagen* and ruling that the reservation had been diminished for jurisdictional purposes. On April 25, 1994, the State and Local Defendants filed a motion in the District Court to vacate and set aside the Injunction Order, and to dismiss the Ute Tribe's motion for permanent injunctive relief. Aplt. App. Tab G, pp. 36-65.

After a United States Magistrate dismissed a federal prosecution of an Indian for crimes occurring in Roosevelt, Utah, on the basis that *Hagen* had held that such

prosecutions were a state responsibility, the State and its subdivisions moved the Court for an Order modifying the Injunction Order to permit state prosecution of felonies within the former reservation boundaries. On May 2, 1994, the District Court temporarily modified the Injunction Order to permit the State and Local Defendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Reservation which were not "Indian country" as defined by 18 U.S.C. § 1151 *et seq.* Aplt. App. Tab H, pp. 66-69. The District Court's modification was without prejudice to the claims of the parties, and did *not* determine the Indian Country status of particular lands. Id.

On September 12, 1994, prior to hearing oral arguments on the pending motions, the District Court entered its Pre-Trial Order, based upon a stipulation between the Ute Tribe and the State and Local Defendants. Aplt. App. Tab J, pp. 76-95. The Pre-Trial Order provided, *inter alia*, that lands within the former reservation boundaries that had been opened and settled pursuant to federal homestead and cash entry laws were not Indian country pursuant to 18 U.S.C. § 1151.[1] Aplt. App. Tab J, p. 88.

3. *Disposition Below.*

On April 2, 1996, the District Court issued a lengthy Memorandum Decision in connection with the pending motions. Aplt. App. Tab L, pp. 170-271. Judge Jenkins declined to rule on the merits of the Tribe's motion for injunctive relief and the state's motion to dissolve the Injunction Order. The District Court instead continued the Injunction Order in full force and effect, with the modification that "Indian Country" did not include "unallotted and unreserved lands of the Uintah Reservation

[1] The Court's stipulated finding that homesteaded lands were not Indian country was subject to the Ute Tribe's contention that the State and Local Defendants are collaterally estopped by *Ute Indian Tribe* from reliance on *Hagen*. Aplt. App. Tab J, p. 88.

that were opened to entry in 1905, to the extent that those lands were not later restored to tribal ownership." Aplt. App. Tab L, p. 265. This modification had the effect of permitting certain state felony prosecutions of Indians, but continued the injunction in effect as to all misdemeanor prosecutions of Indians and exercises of civil jurisdiction within the historic reservation boundaries, even in areas the Court held to be outside Indian Country.

In connection with the Memorandum Decision, Judge Jenkins also filed a Certificate and Request for Further Instructions (the "Request for Further Instructions") directed to the United States Court of Appeals for the Tenth Circuit. Aplt. App. Tab L, pp. 266-271. In the Request for Instructions, the Judge Jenkins noted the direct conflict between the Court of Appeals' mandate in *Ute Indian Tribe*, which held that all lands within the historic reservation boundaries were Indian country, and the decision of the United States Supreme Court in *Hagen*, which held that those boundaries had been diminished for jurisdictional purposes. Id. The District Court requested further instructions from the Court of Appeals in light of this conflict, and indicated that the Court of Appeals could "construe this court's request for instructions as an invitation to recall its own mandate for further consideration." Id. at 269.

On April 12, 1996, the State and Local Defendants filed their Notice of Appeal from Judge Jenkins' decision continuing the Injunction Order in effect, pursuant to 28 U.S.C. § 1292(a)(1). Aplt. App. Tab M, p. 272. On June 12, 1996, the appellants filed a motion pursuant to Fed. R. App. P. 27 for withdrawal and replacement of the mandate in *Ute Indian Tribe*.

SUMMARY OF THE ARGUMENT

1. *The Hagen Decision Conclusively Resolved the Reservation Boundary Issue.*

The United States Supreme Court granted certiorari "to resolve the direct conflict" between the United States Court of Appeals for the Tenth Circuit in *Ute Indian Tribe* and the decisions of the Utah Supreme Court in *State v. Hagen* and *Perank*. 114 S. Ct. at 964. The issue before each of these courts was identical: did Congress' decision early in this century to open the Uintah Reservation to non-Indian settlement do away with the historic boundaries of the reservation for jurisdictional purposes? If so, then the State of Utah was entitled to assert jurisdiction over unallotted opened lands "[a]s a doctrinal matter". *Hagen*, 114 S. Ct. at 964, citing *Solem v. Bartlett*, 465 U.S. 463, 467, 104 S. Ct. 1161, 1164 (1984). If not, then all lands within the historic boundaries remained "Indian country" pursuant to 18 U.S.C. § 1151(a), even if held in fee simple by non-Indians.

In the face of the "direct conflict" between *Ute Indian Tribe* and *State v. Hagen*, the U.S. Supreme Court affirmed the Utah Supreme Court's holding that the reservation had been diminished, and expressly rejected *Ute Indian Tribe's* conclusion that the Uintah Reservation had not been diminished or disestablished. This Court has since stated that *Hagen* "effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, redefined the Reservation boundaries resulting from our earlier decision, and conclusively settled the question." *United States v. Cuch*, 79 F.3d 987, 989 (10th Cir. 1996).

2. *The District Court Has Wrongly Continued to Enjoin State Actions Outside Indian Country Despite Hagen's Affirmance of State Jurisdictional Authority.*

The Supreme Court issued its mandate in *Hagen* over two years ago. The District Court has nonetheless refused (with one limited exception) to dissolve the pre-*Hagen*

injunction prohibiting the State of Utah and its political subdivisions from exercising jurisdictional authority over Indian matters anywhere within the now-rejected boundaries set in *Ute Indian Tribe*. As a result, the Supreme Court's mandate has been frustrated, and the State and its subdivisions find themselves enjoined from performing basic governmental functions within large areas populated almost exclusively by non-Indians,[2] while the tribal and federal authority that purports to fill the void is jurisdictionally suspect.

The District Court's indefinite continuation of what was intended to be a stopgap solution pending the Supreme Court decision in *Hagen* erroneously interferes with the State of Utah's legitimate jurisdictional authority outside Indian country. The United States, the Ute Tribe, and the District Court itself concede that on a substantive basis the majority of fee lands within the former reservation boundaries are now *not* Indian country under 18 U.S.C. § 1151. Not only is there no basis in law for enjoining the exercise of state law outside Indian country, such an injunction is prohibited by the federal Anti-Injunction Act, 28 U.S.C. § 2283, and the federal Full Faith and Credit Act, 28 U.S.C. § 1738.

3. *The Court of Appeals Mandate in Ute Indian Tribe Should Be Withdrawn In Toto, Because It was Based upon an Erroneous and Now Discredited Interpretation of Statutory "Restoration" Language.*

In continuing the Injunction Order, the District Court felt itself compelled to follow this Court's mandate in *Ute*

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[2] See *Perank, supra*, 858 P.2d at 934, n. 10 (population in disputed area consists of 18,000 non-Indians and 300 Indians, not all of the latter being Ute Tribal members). The most problematic aspect of the injunction has been the District Court's express prohibition of state misdemeanor prosecutions against Indians within the expansive boundaries set in *Ute Indian Tribe*, but the injunction also broadly prohibits state action in civil matters such as child welfare and family matters, environmental permitting and enforcement, and collection of taxes.

Indian Tribe, notwithstanding the U.S. Supreme Court's intervening decision to "effectively overrule" that case. While the State of Utah believes that the *Hagen* decision relieved the District Court of the obligation to follow the mandate in *Ute Indian Tribe*, the state shares the District Court's belief that *Ute Indian Tribe* and *Hagen* are irreconcilable. The Court of Appeals' holding in *Ute Indian Tribe* was based upon one fundamental premise—that operative congressional language restoring reservation lands to the public domain did not evidence congressional intent to disestablish the reservation. 773 F.2d at 1095. *Hagen* expressly repudiated that core conclusion:

> Our cases considering *operative* language of restoration [to the public domain] have uniformly equated it with a congressional purpose to terminate reservation status. . . . In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation. Indeed, we have found only one case in which a Federal Court of Appeals decided that statutory restoration language did not terminate a reservation, *Ute Indian Tribe*, 773 F.2d at 1092, a conclusion the Tenth Circuit has since disavowed as "unexamined and unsupported." *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400, cert. denied, 498 U.S. 1012 (1990)

114 S. Ct. at 967. (Emphasis in original).

With *Ute Indian Tribe*'s theory that restoration language is not determinative of disestablishment overturned, the decision also cannot stand as to either the forest lands or the former Uncompahgre Reservation. The Court of Appeals' decision that the Uncompahgre Reservation remained in existence was based purely on this theory.

Similarly, the court's belief that national forest lands set aside out of the Uintah Reservation had remained within tribal jurisdiction was premised explicitly on the absence of Congressional intent to diminish the surrounding boundaries, a controlling assumption that is no longer valid.

Judge Jenkins' 1981 District Court opinion, which sets forth voluminous and overwhelming evidence showing that neither area retains reservation status, remains the definitive analysis of these lands. Even the United States, in its capacity as trustee for the Ute Tribe, has argued to the Supreme Court that the Tenth Circuit's decision concerning Uncompahgre was mistaken, and that the reservation no longer exists. Aplt. App. Tabs R, S. With the clear change in prevailing law since *Ute Indian Tribe*, issues concerning these lands will arise again and again. The Court of Appeals has the opportunity, based upon clear Supreme Court precedent, to resolve these issues fully and finally. It can do so by recalling the mandate in *Ute Indian Tribe*, and substituting the correctly decided original panel decision of the Court of Appeals. *Ute Indian Tribe v. State of Utah*, 716 F.2d 1298 (10th Cir. 1983).

4. *The District Court Misinterpreted Hagen's Jurisdictional Effect on Non-Trust "Fee" Lands.*

The District Court has also adopted an unduly narrow interpretation of *Hagen*, thus permitting continued tribal jurisdiction over certain fee simple lands.[2] Under 18 U.S.C. § 1151, fee lands (e.g. lands not held in trust by

[2] The State of Utah does not and has at no time in this litigation sought to exercise jurisdiction over lands held in trust by the United States for the Tribe and individual Indian allottees. All of these lands are undisputedly Indian country because of their trust status. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 910, 112 L.Ed. 2d 1112 (1991). This case relates solely to whether the Tribe has jurisdiction over non-Indian federal lands, as well as state, and private lands within the historic reservation boundaries.

the United States for a tribe or individual Indian allottee) may be considered Indian country only if the lands are (a) within the limits of a reservation; or (b) within a dependent Indian community (an issue not before the Court). Individual Indian allotments outside reservation boundaries remain in Indian Country pursuant to 18 U.S.C. § 1151(c) only to the extent that Indian title has not been extinguished.

The District Court ruled that Congress' diminishment of the reservation boundaries left the boundaries conterminous with the boundaries of scattered individual allotments and parcels reserved at the time for communal tribal use, particularly the tribal grazing reserve. Memorandum Decision at 18-19, Aplt. App. Tab L, pp. 187-188. Under this theory, lands that have left Indian trust ownership other than through the original opening of the reservation (primarily former trust allotments sold into non-Indian ownership prior to 1934) remain within the boundaries of a reservation because the parcel boundaries each ostensibly became a reservation boundary.

This conclusion contradicts both established reservation diminishment law and multiple assertions by the Tribe in this litigation and in *Perank/Hagen*. At all times prior to the final briefing of the injunction issues before the District Court, the Tribe clearly asserted that if *Perank/Hagen* were affirmed, tribal jurisdiction would be limited to tribal lands and trust allotments. Now that this eventuality has come to pass, the Tribe has abandoned its prior position in an attempt to retain jurisdiction over at least some non-trust lands. If upheld, this position will further complicate jurisdictional decisions in the already "checkerboarded" Uintah basin. Instead of relatively straightforward determinations based upon trust vs. non-trust status (as was the case for eighty years prior to *Ute Indian Tribe*), the District Court's position requires a historical title review each time jurisdiction on non-Indian lands may be an issue. Inclusion of the disputed fee lands

in Indian country is unjustified from both a legal and practical standpoint.

5. *Overview.*

The jurisdictional issue before the Court has been an emotional one for the citizens of Utah, Indian and non-Indian alike, in the ten years since *Ute Indian Tribe.* The Ute Tribe and its counsel have repeatedly vilified the Utah Supreme Court, and the State's attorneys, for having argued (as it turns out, correctly) in *Perank* that the Court of Appeals' decision in *Ute Indian Tribe* was mistaken. The Tribe's portrayal of the State as having pursued a cunning and deceitful strategy to deprive the Ute Tribe of jurisdiction by prosecuting Indians in defiance of the Tenth Circuit is grossly untrue. The State has acted with good faith towards the Tribe, and certainly intends to do so in the future.

That said, there is and has been a profound disagreement between the State and the Tribe over the jurisdictional boundaries of the reservation. *Ute Indian Tribe* effectively created the second largest Indian reservation in the continental United States for some 1500 tribal members, and subjected vast areas where there are no Indian residents and no Indian lands to tribal jurisdiction. Utah has a strong and legitimate interest in the ultimate resolution of this dispute.

The District Court has chosen not to implement the Supreme Court's ruling in *Hagen.* Whatever the legal merits or demerits of the District Court's decision, the state strongly believes that the injunction has exacerbated an already difficult situation, as disputes that would otherwise be resolved by discussion are viewed in the prism of litigation. In retrospect, it is unfortunate that in 1986 the U.S. Supreme Court did not grant certiorari in *Ute Indian Tribe* and resolve the issue of jurisdiction at that time. With *Hagen*, however, the Supreme Court has done so, fully and finally. This Court should implement the

Supreme Court's mandate, and give the parties the opportunity to resolve their differences outside the courtroom.

ARGUMENT

I. THE DISTRICT COURT COMMITTED ERROR BY CONTINUING THE INJUNCTION ORDER OUTSIDE INDIAN COUNTRY ONCE *HAGEN* BECAME FINAL.

A. *Standard of Review.*

In reviewing the District Court's decision to continue an injunction, the Court of Appeals uses an abuse of discretion standard, and examines "whether the district court committed an error of law or relied on clearly erroneous fact findings." *Walmer v. Department of Defense*, 52 F. 3d 851, 854 (10th Cir. 1995). Questions of law decided by the District Court in connection with a decision are reviewed *de novo*. *Kansas ex rel Stephan v. Adams*, 608 F. 2d 861, 867 n. 5 (10th Cir. 1979); see also *Blalock Eddy Ranch v. MCI Telecommunications*, 982 F. 2d 371, 375 (9th Cir. 1992) (applicability of Anti-Injunction Act is issue of law to be reviewed *de novo*).

B. *The District Court Has Enjoined the State from Exercising Jurisdiction In Areas Undisputedly Not Indian Country.*

As a general rule in Indian affairs, the existence of federal and tribal jurisdictional authority is determined in both civil and criminal matters by whether the locus of the subject activity has been determined to be "Indian country" pursuant to 18 U.S.C. § 1151. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n. 2, 95 S. Ct. 1082, 1085, n. 2; *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F. 3d 1531, 1540-41 (10th Cir. 1995).

In its April 2, 1996 Memorandum Decision, the District Court concluded:

> According to the United States Supreme Court's decision in *Hagen* . . ., the 1902-1905 Acts "opening" the Uintah Reservation to non-Indian entry and settlement operated to restore the unallotted and unreserved lands of that Reservation to the public domain. In doing so, the 1902-1905 Acts diminished —that is, reduced or curtailed—the boundaries of the reservation to the extent of the lands thus "opened." *Insofar as these "opened" lands were not later returned to tribal ownership and jurisdiction by subsequent congressional and administrative action, they ceased to have reservation status in 1905 and are no longer found within "Indian Country" within the meaning of 18 U.S.C. § 1151 (1994).* Memorandum Decision at 90 (Emphasis added).

Although the State of Utah believes that certain other "fee" lands within the former reservation boundaries—particularly former allotments no longer in Indian ownership—are also no longer Indian country after *Hagen*, the District Court's conclusion that "opened" lands now held in fee ownership are no longer Indian country is a general point of agreement between the Tribe, the United States, and the State.[3] The District Court nonetheless refused to dissolve its injunction concerning these areas—the very areas that the courts in *Hagen* and related cases have held to be within state jurisdiction—including the towns of Roosevelt, Duchesne, and Myton.

The District Court chose to maintain the injunction in effect because it felt that the Court of Appeals' mandate in *Ute Indian Tribe* required it to do so:

> Pursuant to the court of appeals' mandate, conducting "further proceedings in accordance with the opin-

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[3] The Tribe concedes that these lands are not Indian country subject to its contention that the State is collaterally estopped from relying on *Hagen* in this litigation. Aplt. App. Tab J, p. 88. The United States has also recognized that these lands are not Indian Country. See Tr. 5/12/94.

> ion" in *Ute Indian Tribe* requires continuing enforcement of the orders previously entered by this court preserving the jurisdictional status quo consistent with that ruling. Memorandum Decision at 93.

The District Court's conclusions are erroneous for several reasons. First, although the District Court judiciously showed deference to the mandate of this court in *Ute Indian Tribe*, Tenth Circuit law does in fact permit a district court to depart from the Court of Appeals' mandate when there has been a clear change of intervening law. In light of this Court's statement that *Hagen* "effectively overruled" *Ute Indian Tribe*, it was an abuse of discretion for the District Court to enjoin the state outside of Indian country based upon the *Ute Indian Tribe* mandate. Second, the Anti-Injunction Act, 28 U.S.C. § 2283, generally prohibits the federal judiciary from enjoining state judicial proceedings or reliance on such proceedings by state officers. Once *Perank/Hagen* became final, collateral estoppel could not be applied against the State. The District Court was obligated to give *Hagen* full faith and credit under the Full Faith and Credit Act, 28 U.S.C. § 1738, and lost any power under the relitigation exception to the Anti-Injunction Act to enjoin state actions taken in reliance upon *Hagen*.

C. *The District Court Abused Its Discretion By Refusing to Apply Hagen In Determining the Geographic Scope of Its Injunction.*

1. The Mandate Rule and the Law of the Case.

The District Court's analysis of the "mandate rule" led it to conclude that it must seek permission from the court of appeals prior to departing from *Ute Indian Tribe*'s holding that the reservation had not been diminished. Mem. Dec. at 84, Aplt. App. Tab L, p. 253. It went on to conclude that the mandate in *Ute Indian Tribe required*

it to continue the injunction against state jurisdiction within the historic reservation boundaries, notwithstanding the court's own conclusion that opened lands were no longer Indian country pursuant to *Hagen*. Mem. Dec. at 93, Alpt. App. Tab L, p. 262.

The "mandate rule" is a subsidiary component of the doctrine of the "law of the case." This court has described the law of the case doctrine as follows:

> The law of the case doctrine posits that "[w]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L.Ed. 2d 358 (1979). . . . [T]he law of the case doctrine is solely a rule of practice and not a limit on the power of the court. *Messinger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L.Ed. 1152 (1912). *See also Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981) (law of the case doctrine is not an "inexorable command" but a rule to be applied with good sense.)

Mason v. Texaco, Inc., 948 F. 2d 1546, 1553 (10th Cir. 1991). The purpose of the law of the case doctrine is to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478, at 788 (1981).

The mandate rule functions as a part of the law of the case doctrine by binding every court to honor rulings in the case by superior courts. *Casey v. Planned Parenthood of Southeastern Pennsylavnia*, 14 F. 3d 848, 856 (3rd Cir. 1994). It is important to note that the mandate rule is applicable only to courts lower in the judicial hierarchy than the court rendering the decision in question; a court

of appeals may (and perhaps must) reconsider and redecide its own decisions on the basis of intervening Supreme Court decisions.[4] See *EEOC v. K-Mart Corp.*, 796 F. 2d 139, 146 (6th Cir. 1986).

2. District Courts May Depart from an Appellate Mandate Where There Has Been a Clear Change In Intervening Law.

It is difficult to fault the District Court for exhibiting substantial deference to this Court. Nonetheless, a District Court may in some circumstances depart from an appellate mandate in the face of intervening law to the contrary. In *Ad-Vantage Telephone Dir. Co. v. GTE Directories*, 943 F. 2d 1511 (11th Cir. 1991), the Eleventh Circuit stated that *trial court* proceedings subsequent to an appellate mandate must follow the mandate unless:

> the presentation of new evidence *or an intervening change in the controlling law* dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice.

943 F. 2d at 1518, citing *Piambino v. Bailey*, 757 F. 2d 1112, 1119-1120 (11th Cir. 1985), cert. den. 476 U.S. 1169 (1986) (Emphasis in original).

The ability of trial courts to depart from an appellate mandate where there has been a clear intervening change in law is well-recognized. See e.g. *Johnson v. Uncle Ben's, Inc.*, 965 F. 2d 1363, 1369-1370 (5th Cir. 1992); *Lenard v. Argento*, 808 F. 2d 1242, 1245-1246 (7th Cir. 1987). The Tenth Circuit has adopted the same general standard for departure from the law of the case as other circuits. *Pittsburg & Midway Coal Mining Co. v. Watch-*

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[4] The District Court clearly drew this distinction, noting what it believed to be a "critical difference in posture between the court of appeals and the district court" in dealing with the effect of a later Supreme Court decision on an appellate mandate. Mem. Dec. at 71-72.

man, 52 F. 3d 1531, 1536 n. 4 (10th Cir. 1995); *United States v. Monsisvais*, 946 F. 2d 114, 117 (10th Cir. 1991). In line with this standard, the Tenth Circuit has permitted a trial court to depart from the mandate where different evidence surfaced on retrial. *Mason v. Texaco*, 948 F. 2d 1546, 1553 (10th Cir. 1991). There is no question that a District Court's departure from an appellate mandate should take place cautiously and rarely, but *Mason* indicates it is permissible when the conditions for departure from the law of the case are present.

3. The District Court Should Have Applied *Hagen*.

This is such a case. The Supreme Court has ruled on the *exact* same issues decided in *Ute Indian Tribe*, and has effectively overruled that decision. The District Court recognized that the two decisions are fundamentally irreconcilable. Although the District Court's opinion makes it clear that it is unhappy with the course events have taken, the federal courts have an obligation to broadly apply applicable Supreme Court decisions. *Guidry v. Sheet Metal Workers Int'l.*, 10 F. 3d 700, 706 n. 3 (10th Cir. 1993), citing *McCoy v. Massachusetts Inst. Of Technology*, 950 F. 2d 13, 19 (1st Cir. 1991) ("If lower courts felt free to limit Supreme Court opinions precisely to the facts of each case, then our jurisprudence would be in shambles. . . .").

The injunction has created significant jurisdictional and practical problems. The state cannot now prosecute Indian offenders in areas such as the town of Roosevelt, but tribal jurisdiction over areas outside Indian country is uncertain at best. See *General Motors Acceptance Corp. v. Chischilly*, 628 P. 2d 683 (N.M. 1981) (civil jurisdiction did not extend to tribal member on off-reservation trust lands). It seems entirely possible that the Ute tribal court does not have jurisdiction to prosecute misdemeanor offenses outside Indian country, and, indeed, the state is aware of no successful tribal prosecutions of off-trust lands misdemeanors in the interval since the Memorandum

Decision.[5] As a practical matter, the injunction's artificial delineation between felonies and misdemeanors forces state and local law enforcement personnel to make impossible decisions to comply with the injunction. If an apprehended theft suspect has $251 of stolen goods, a felony, their citation was legal; if the goods are worth $249, a misdemeanor, the officer is in contempt of the District Court. See *Utah Code Ann.* § 76-6-412. Similar problems of arise in determining whether an ongoing assault is a misdemeanor or felony. See *Utah Code Ann.* §§ 76-5-102, 103. The problems extend beyond criminal matters. For example, the state is enjoined from routinely collecting sales from tribal members even if the nexus of the tax is outside Indian country. With every day that the injunction is in place the lost revenues accrue, without any possibility that the state will recover them in the future.

The District Court could legally have departed from the mandate of the Court of Appeals in *Ute Indian Tribe* once the U.S. Supreme Court effectively overruled that case. By maintaining indefinitely its injunction against state jurisdiction in areas outside Indian country, the District Court has abused its discretion.

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[5] While this may seem to be a minor issue, misdemeanor crimes include serious offenses such as assault, drunk driving, and negligent homicide. The state has an obligation to all of its citizens, Indian and non-Indian alike, to preserve public safety. It is strongly concerned that the Injunction Order has had the practical effect of creating a jurisdictional vacuum for misdemeanor crimes in the most populous areas in the Uintah Basin.

D. *The Federal Anti-Injunction and Full Faith and Credit Acts Prohibit the District Court from Enjoining the State's Reliance on Hagen/Perank or Taking Actions Having That Effect.*

1. The Anti-Injunction Act and the Relitigation Exception to That Act.

The Ute Tribe's Motion for Permanent Injunction Relief is barred by the Anti-Injunction Act, 28 U.S.C. § 2283. The Anti-Injunction Act prohibits a federal court from staying proceedings in a state court except where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C. § 2283. The Anti-Injunction Act was enacted to preserve the independence of state judicial systems. *Brooks v. Barbour Energy Corp.*, 804 F. 2d 1144, 1146 (10th Cir. 1986), citing *Commodity Futures Trading Commission v. Chilcott Portfolio Management*, 713 F. 2d 1477, 1484 n. 5 (10th Cir. 1983). Congress has provided for exceptions to the Anti-Injunction Act, which permit (although do not require) federal injunctions of state proceedings. These exceptions are narrow, and may "not be enlarged by loose statutory construction." *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287, 90 S. Ct. 1739, 1743 (1970). Any doubts about the propriety of the injunction should be resolved against its issuance. *Brooks v. Barbour Energy Corp., supra.* The particular exception to the Anti-Injunction Act relied upon by the Tribe in this case is the relitigation exception. Aplt. App. Tab E, pp. 26-27. This exception permits a federal injunction of state court proceedings where the party asserting a claim or issue in the state court is barred from doing so by principles of res judicata or collateral estoppel.

2. Collateral Estoppel Became Irrelevant Once *Hagen* Became Final.

Of course, the relitigation exception cannot apply unless the party to be enjoined is in fact barred by res judicata or collateral estoppel from proceeding in the state action. In its Memorandum Decision, the District Court devoted 28 pages of analysis to whether the State of Utah was barred by the doctrine of collateral estoppel from relitigating the reservation boundary issue or relying on *Hagen*, before finally determining not to rule on the issue because of the mandate rule. Mem. Dec. 49-67, Aplt. App. Tab L, pp. 217-235. Although the Court's conclusion that the mandate rule governs was correct, its lengthy analysis of collateral estoppel was unnecessary. The State of Utah is not now relitigating the reservation boundaries—the only situation where collateral estoppel might apply.[6] The United States Supreme Court has issued a final ruling, its mandate has issued, and the Utah Supreme Court has issued its remittitur in *Hagen* and *Perank*. The boundary litigation is over. The question before the Court is one of law of the case—what effect the final decision in *Hagen* has in the reborn case of *Ute Indian Tribe*—rather than

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[6] As a related argument, the Ute Tribe has contended that, because it was not a party to *Hagen*, it cannot be bound by that decision. Doc. 30 at 12, citing *Georgia v. South Carolina*, 497 U.S. 376, 110 S. Ct. 2903, 2913 (1990). It believes that *Hagen* at most permits the State of Utah to assert jurisdiction over non-member Indians within the former reservation boundaries, while *Ute Indian Tribe* governs the relationship between the state and Ute tribal members. The argument that the Ute Tribe may not be bound by *Hagen* misses the point. The Tribe's non-participation in *Hagen* means that the Tribe's reservation boundary claims cannot be summarily dismissed on collateral estoppel grounds—it is not *bound* under preclusion principles. That is all that *Georgia v. South Carolina* and related cases say. However, under the doctrine of *stare decisis*, the U.S. Supreme Court has in *Hagen* provided the applicable rule of decision under which jurisdictional disputes must be resolved by the courts.

collateral estoppel. *Hull v. Freeman*, 991 F. 2d 86, 90 (3rd Cir. 1993) (reconsideration of issues in same case governed by law of the case, not collateral estoppel). If the Court of Appeals' mandate in *Ute Indian Tribe* is no longer viable, whether through application of intervening law or the Court of Appeals' recall of the mandate, then a claim of collateral estoppel based upon that decision cannot stand.

3. *Parsons Steel* and the Full Faith and Credit Act.

Even were collateral estoppel a relevant concept once *Hagen* became final, the doctrine would not provide support for the continuation of the Injunction Order outside Indian country. The decision of the United States Supreme Court in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986) applies here. In *Parsons Steel*, the Supreme Court held that under the Full Faith and Credit Act, 28 U.S.C. § 1738, once a state court has rejected a claim that a federal judgment is binding through res judicata, federal courts must give the state judgment effect. 106 S. Ct. at 772. Perhaps the most significant aspect of *Parsons Steel* for the purposes of this case is the Supreme Court's description of the remedy in the event the prevailing party in a prior federal action feels that the state court has failed to give the federal judgment proper preclusive effect:

> Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court.

106 S. Ct. at 772-773.

Of course, that is what happened here. The Utah Supreme Court effectively ruled on the collateral estoppel issue in *State v. Hagen*.[7] In *State v. Hagen*, the Utah

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[7] The *Perank* court also addressed the applicability of collateral estoppel in a lengthy footnote, discussing why under Utah law the

Court of Appeals had ruled in favor of Mr. Hagen on grounds including collateral estoppel. *State of Utah v. Hagen*, 802 P. 2d 745, 747 (Utah App. 1990), *reversed* 858 P. 2d 925 (Utah 1992). The Utah Supreme Court reversed on the basis of *Perank*, effectively rejecting the state court of appeals' holding on the collateral estoppel issue. On writ of certiorari, the U.S. Supreme Court then declined to rule on the issue despite extensive briefing and argument, the petitioner having failed to raise it in his petition for certiorari. *Hagen*, 114 S. Ct. at 965. In its Memorandum Decision, the District Court recognized that "it seems fairly apparent that the question of the collateral estoppel effect of *Ute Indian Tribe* had been raised and ruled on in *Hagen*." Mem. Dec. at 52, n. 54. This being the case, the Full Faith and Credit Act, as interpreted in *Parsons Steel*, required the District Court to give effect to the Utah Supreme Court's decision that *Ute Indian Tribe* did not collaterally estop the State from readdressing the reservation boundary issue.

II. THE COURT OF APPEALS SHOULD RECALL ITS MANDATE IN *UTE INDIAN TRIBE*, AND ISSUE A NEW MANDATE CONSISTENT WITH *HAGEN*.

A. *Standard of Review.*

Concurrently with this appeal, the State of Utah has filed a motion pursuant to Fed. R. App. P. 27 asking the Court of Appeals to recall its mandate in *Ute Indian Tribe*

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doctrine would not have applicability to bar reconsideration of the reservation boundary issue. 858 P. 2d at 931, n. 3. The Court noted that res judicata is a waivable defense, and that neither Perank, the U.S. Department of Justice, or the Tribe had suggested that *Ute Indian Tribe* had res judicata effect in the case before it—in fact, the Department of Justice had indicated in its brief that the Utah Supreme Court was entitled to redecide the issue. 858 P. 2d at 931, n. 2. The *Perank* court's discussion of the issue is a clear indication of the Utah Supreme Court's analysis of the collateral estoppel issue.

and issue a new mandate consistent with the Supreme Court's analysis of the reservation disestablishment issue in *Hagen*. The Court of Appeals also has before it the April 2, 1996 Certificate and Request for Further Instructions of the District Court, in which the District Court has asked the Court of Appeals for direction concerning the continuing effect of the *Ute Indian Tribe* mandate after *Hagen*.[8]

The Court of Appeals has the inherent power to recall a prior mandate upon a showing of good cause. *Coleman v. Turpin*, 827 F. 2d 667, 671 (10th Cir. 1987); see also 16 C. Wright, A. Miller & E. Gressman, *Federal Practice & Procedure* § 3938, at 276-278 (1977) ("The . . . broad power to recall . . . persists, as a matter of inherent power, subject to no definite time constraint."). Although recall of a prior mandate is subject to the doctrine of the law of the case, that doctrine does not prevent the recall of a mandate issued in prior litigation between two parties if "controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F. 3d 1531, 1536 n. 4 (10th Cir. 1995); *United States v. Monsisvais*, 946 F. 2d 114, 117 (10th Cir. 1991); *see also Odum v. Boone*, 62 F. 3d 327, 333 n. 2 (10th Cir. 1995) (intervening Supreme Court decision on point controls over prior Court of Appeals decision).

In *Higgins v. California Prune & Apricot Growers, Inc.*, 3 F. 2d 896 (2d Cir. 1924), Judge Learned Hand succinctly described the Court of Appeals' obligation to give effect to an intervening Supreme Court decision notwithstanding its prior mandate:

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[8] In the Request for Further Instructions, the District Court stated: "If it so chooses, the court of appeals may construe this court's request for instructions as an invitation to recall its own mandate for further consideration." Aplt. App. Tab L, p. 269.

> The District Court declined to consider the effect of [an intervening Supreme Court] decision, feeling bound by the mandate of this court, rightly, as we think. If, however, we are free to reconsider our earlier decision at all, there would seem to be no question of our duty to follow the later decision of the Supreme Court. We think we are so free . . . . [I]t is now well settled that the "law of the case" does not rigidly bind a court to its former decisions, but is only addressed to its good sense. There can surely be no greater reason for changing our views than because the Supreme Court has directly ruled upon the precise point in the interim.

3 F. 2d at 897-898 (citations omitted). Judge Hand's view has been echoed in later cases; the Sixth Circuit has aptly described the effect of a prior panel ruling in the same case once the Supreme Court has issued an intervening decision on the issue in question in a different case:

> We leave to the last appellee's argument that this court's original opinion provides the law of the case. *Whatever weight a panel of this court should give to a prior opinion of another panel of our court, it clearly cannot control as opposed to an opposite view expressed in final language by the United States Supreme Court in a similar case.*

EEOC v. K-Mart Corp., 796 F. 2d 139, 146 (6th Cir. 1986) (Emphasis added).

As more fully set forth below, the primary substantive premise behind this Court's opinion in *Ute Indian Tribe* was that after *Solem v. Bartlett*, 465 U.S. 463, 104 S. Ct. 1161 (1984) ("*Solem*"), Congressional language restoring reservation lands to the public domain was not determinative of reservation disestablishment. *Hagen* expressly repudiated that premise in a case involving the identical record and the identical issue. As Judge Hand recognized,

where the Supreme Court has directly ruled upon the precise point in the interim, the court's prior inconsistent mandate must give way.

B. *Hagen Overruled Ute Indian Tribe's Fundamental Premise That Statutory Restoration Language Is Insufficient to Infer Disestablishment.*

1. The Surplus Land Acts.

Ute Indian Tribe, Perank and *Hagen* all hinged upon whether a series of acts passed by Congress between 1902 and 1905 disestablished the boundaries of the Uintah Reservation. The first act in question, the Act of May 27, 1902, ch. 888, 32 Stat. 263 (the "1902 Act"), provided that if the majority of the adult male members of the Uintah and White River Indians consented, the Secretary of Interior should make allotments of specified quantities of reservation lands to tribal members, and that after the deadline for making such allotments, "all the unallotted lands within said reservation shall be restored to the public domain."

Shortly after the 1902 Act, the U.S. Supreme Court held that Congress could unilaterally allot Indian lands and alter reservation boundaries without tribal consent. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-568, 23 S. Ct. 216, 222, 47 L.Ed. 299 (1903). Congress subsequently directed the Secretary of Interior to allot the Uintah lands unilaterally if the Indians did not give their consent by June 1 of that year, and deferred the opening of the unallotted lands "as provided by the [1902 Act]" until October 1, 1904. Act of March 3, 1903, ch. 994, 32 Stat. 998 (the "1903 Act"). In 1904, Congress again deferred the opening "as provided by the [1902 and 1903 Acts]" until March 10, 1905. Act of April 21, 1904, ch. 1402, 33 Stat. 207 (the "1904 Act"). Finally, in 1905, Congress provided that the manner of opening would be as follows:

> That the said unallotted lands . . . shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof.

Act of March 3, 1905, ch. 1479, 33 Stat. 1069 (the "1905 Act"). President Theodore Roosevelt subsequently issued a proclamation stating that, pursuant to the 1902, 1903, 1904 and 1905 Acts, all the unallotted lands in the reservation would be opened to entry effective August 28, 1905. 34 Stat. 3119-3120.

2. The District Court and Panel Decisions.

The District Court's lengthy 1981 decision concerning the disestablishment issue turned upon whether the opening of the reservation had been accomplished by the 1902 Act or the 1905 Act. *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1122-1132 (D. Utah 1981). The District Court stated:

> Without much question, opening of the Uintah Reservation under the original terms of the 1902 Act would have accomplished the termination of the reservation; the unallotted lands were to be "restored to the public domain"—language precisely suited to disestablishment under *Seymour v. Superintendent*, 368 U.S. 351, 354-356, 82 S. Ct. 424, 426-427, 7 L. Ed. 2d 346 (1962), and *Mattz v. Arnett*, 412 U.S. 481, 504 n. 22, 93 S. Ct. 2245, 2257, 37 L.Ed. 2d 92 (1975).

521 F. Supp. at 1122. The District Court concluded, however, that the 1905 Act effectively repealed the public domain language of the 1902 Act, and that in the absence of such language, the opening of the reservation in 1905 had not disestablished it. 521 F. Supp. at 1131-1132.

The initial panel decision rendered by this Court in *Ute Indian Tribe* reached the opposite conclusion about which statute accomplished the opening of the Uintah Reservation. *Ute Indian Tribe v. State of Utah*, 716 F. 2d 1298, 1309-1312 (10th Cir. 1983), *vacated* 773 F. 2d 1087. Writing for the panel majority, Chief Judge Seth held that the 1905 Act was not intended to affect the substantive terms of the 1902 Act, which thus remained the operative statute[9] 716 F. 2d at 1312. He further concluded that Congress' inclusion of language within the 1902 Act restoring reservation lands to the public domain was in itself was sufficient to infer disestablishment: "a phrase such as 'vacated and restored to the public domain' seems to be a sufficient though not a necessary factor in disestablishment." 716 F. 2d at 1303.

Judge Seth's conclusion was based in large part upon the Supreme Court's analysis of the disestablishment of the Lake Traverse Indian Reservation in *DeCoteau v. District County Court*, 420 U.S. 425, 95 S. Ct. 1082, 43 L.Ed. 2d 300 (1975). In that case, the Supreme Court held that the Lake Traverse reservation had unquestionably been returned to the public domain, "stripped of reservation status." 420 U.S. at 446, 95 S. Ct. at 1094. Judge Seth noted that the Supreme Court spoke as if a restoration to the public domain was synonymous with "stripped of reservation status" and that restoration language therefore settled the issue of disestablishment.[10] 716 F.2d at 1302. The panel therefore reversed the trial court's determination that unallotted opened lands re-

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[9] Judge Seth noted that this Court had previously decided in *Hanson v. United States*, 153 F. 2d 162, 162-163 (10th Cir. 1946), that the 1902 Act had been the operative statute restoring the reservation to the public domain, with the 1905 Act merely extending the date of the opening. 716 F. 2d at 1311.

[10] In *Hagen*, the Supreme Court validated Judge Seth's analysis by expressly holding that restoration language evidences congressional intent with respect to restored lands inconsistent with the continuation of reservation status. 114 S.Ct. at 967.

mained part of the Uintah Valley reservation.[11] 716 F. 2d at 1315.

3. The *En Banc* Court's Mistaken View of *Solem v. Bartlett.*

Subsequent to the August, 1983 panel decision in *Ute Indian Tribe,* this Court granted rehearing of the case *en banc.* In the interval between the grant of rehearing and the *en banc* decision in September, 1985, the United States Supreme Court decided *Solem v. Bartlett,* 465 U.S. 463, 104 S. Ct. 1161, 79 L.Ed. 2d 443 (1984) (*"Solem"*). In reversing the panel decision and holding that the original Uncompahgre and Uintah Valley reservations had not been disestablished, the *en banc* majority in *Ute Indian Tribe* mistakenly believed that *Solem* had changed the law in reservation boundary cases to minimize the effect of restoration language on the disestablishment issue.

The *en banc* decision rests upon the core proposition that operative Congressional language restoring reservation lands to the public domain "is *not* the same as a congressional state of mind to disestablish," and hence "does *not* reliably establish the clear and unequivocal evidence of Congress' intent to change the boundaries." 773 F. 2d at 1092 (emphasis added). In so holding, the majority acknowledged that this had not been the law prior to *Solem,* and, indeed, all judges who had considered this case before *Solem* agreed that operative restoration language was synonymous with disestablishment.[12] To the

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[11] The panel decision in *Ute Indian Tribe* also affirmed the trial court's holding that the original Uncompahgre Reservation was disestablished by Congress pursuant to the Act of June 7, 1897, and no longer existed, as well as the trial court's finding that the national forest lands were no longer part of the reservation. Id.

[12] As noted above, the District Court concluded that the 1902 Act was not the operative act opening the reservation, but stated that had it been, the reservation would have been terminated. 521

Ute Tribe court, however, *Solem* altered this long-standing principle of interpretation: "Ultimately, I interpret *Solem* to hold that 'public domain' language standing alone is insufficient to support a finding of explicit congressional intent to disestablish." 773 F. 2d at 1095 (Seymour, J., concurring). Based upon their view that *Solem* had altered reservation disestablishment jurisprudence, the majority concluded that neither the Uintah Valley reservation nor the Uncompahgre Reservation had been diminished or disestablished. The Court went on to find that it was the 1905 Act that actually effected the opening, rather than the 1902 Act. 773 F. 2d at 1089.

4. The Supreme Court Held in *Hagen* that Restoration to the Public Domain Is Synonymous With Disestablishment.

In *Hagen*, the U.S. Supreme Court accepted certiorari "to resolve the direct conflict" between *Ute Indian Tribe* and the decisions of the Utah Supreme Court in *Perank* and *State v. Hagen*. The Utah decisions had held, contrary to *Ute Indian Tribe*, that the Uintah Reservation had been diminished by Congress, and accordingly had upheld the exercise of state criminal jurisdiction over an Indian defendant for acts occurring in Myton, Utah, within the historic reservation boundaries. The Utah Supreme Court in *Perank* had engaged in a lengthy analysis of whether the restoration language contained in the 1902 Act established the necessary congressional intent to diminish the reservation, and concluded that operative statutory language restoring reservation land to the public demain established Congress' intent to diminish the reservation. *Perank* court noted that, with the sole exception of *Ute Indian Tribe*, every relevant decision had considered restoration language to be "synonymous with extinction of

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F. Supp. at 1122. In his dissent to the panel opinion, Judge Doyle evidenced a similar understanding that operative restoration language meant disestablishment. 716 F.2d at 1319.

reservation status." 858 P. 2d at 939. The *Perank* court went on to hold that the 1902 Act rather than the 1905 Act "established the basic statutory authority for opening the Uintah Reservation and that Congress intended thereby to diminish the Reservation." 858 P. 2d at 927.

In *Hagen*, a seven member majority of the U.S. Supreme Court sided squarely with the Utah Supreme Court. Historically, federal reservations of public lands for various purposes had been made specifically to remove lands from the public domain, e.g. from the possibility of settlement. It followed that when lands so reserved were "restored" to the public domain, their previous public use was extinguished. 114 S. Ct. at 966. Reviewing its prior disestablishment cases, the Court found that its "cases considering *operative* language of restoration have uniformly equated it with a congressional purpose to terminate reservation status." [13] The Court went on to hold:

> In light of our precedents, we hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act

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[13] The *Hagen* court also distinguished language in *Solem* that the *Ute Indian Tribe* court relied upon to lessen the effect of restoration language. The act in *Solem* had made reference to tribal rights to harvest timber on lands within the reservation so long as the lands were part of the public domain. *Solem, supra*, 104 S. Ct. at 1168. The *Ute Indian Tribe* court had relied upon this this reference to find that restoration language standing alone is insufficient to find congressional intent to disestablish, since the *Solem* court had found no disestablishment. *Ute Indian Tribe, supra*, 773 F. 2d at 1095 (Seymour, J., concurring). *Hagen* pointed out that, in contrast to the 1902 Act, the act in *Solem* had not *restored* the lands to the public domain, and, more importantly, a reference in the act to the public domain did not appear in the *operative* language of the statute opening the reservation lands for settlement. 114 S. Ct. at 967.

> indicates that the Act diminished the reservation. Indeed, we have found only one case in which a federal Court of Appeals decided that stautory restoration language did not terminate a reservation, *Ute Indian Tribe,* 773 F.2d at 1092, a conclusion the Tenth Circuit has since disavowed as "unexamined and unsupported." *Pittsburg and Midway Coal Mining Co. v. Yazzie,* 909 F. 2d 1387, 1400, cert. Denied, 498 U.S. 1012, 111 S. Ct. 581, 112 L.Ed.2d 586 (1990).

114 S. Ct. at 967.

Moving on to the issue of which Act—the 1902 Act or the 1905 Act—provided the operative statutory language, the Court held:

> Until the *Ute Indian Tribe* litigation in the Tenth Circuit, every court had decided that the unallotted lands were restored to the public domain pursuant to the terms of the 1902 Act, with the 1905 Act simply extending the time for opening and providing a few details. Petitioner argues, however, that the 1905 Act changed the "manner" in which the lands were to be opened. . . . We disagree, because the baseline intent to diminish the reservation expressed in the 1902 Act survived the passage of the 1905 Act.

114 S. Ct. at 967 (internal citations omitted).

The *Hagen* decision thus knocked both legs out from under the reasoning of *Ute Indian Tribe*. Operative language of restoration to the public domain did in fact indicate Congressional intent to diminish the reservation, and the 1902 Act provided that operative language. Without these two points, there is simply nothing left of *Ute Indian Tribe*. As this court has held in the interval. *Hagen* "effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, redefined the Reservation boundaries resulting from our earlier decision, and

conclusively settled the question." *United States v. Cuch*, 79 F. 3d 987 (10th Cir. 1996). The Court of Appeals should therefore recall its opinion and mandate on reconsideration in *Ute Indian Tribe*, leaving the correctly reasoned panel decision as the decision of the Court.

C. *Ute Indian Tribe's Holding Concerning the National Forest Lands and the Uncompahgre Reservation Is No Longer Viable After Hagen.*

Ute Indian Tribe, of course, did not just involve the homesteaded lands of the Uintah Reservation. Each of the three opinions also addressed whether lands added to the Uintah National Forest by the 1905 Act,[14] and the Uncompahgre Reservation to the east, had been stripped of reservation status by Congress. The District Court's 1981 decision had held that while the Uintah Valley Reservation had not been disestablished, the national forest lands and the Uncompahgre Reservation had lost their reservation status and were no longer Indian country. 521 F. Supp. at 1153-1154. The Court of Appeals' panel decision reversed the District Court on the Uintah Reservation, finding that that reservation had in fact been disestablished, but concurred with the District Court on the disestablishment of the forest lands and Uncompahgre. 716 F. 2d at 1315. Finally, the *en banc* opinion in *Ute Indian Tribe*, based upon its conclusion that *Solem* had changed the standard for finding disestablishment, held that none of the three areas had been disestablished, and all remained Indian country for jurisdictional purposes.

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[14] The 1905 Act provided in part: "That before the opening of the Uintah reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest reserves, . . . such portions of the lands within the Uintah reservation as he considers necessary." By proclamation, President Theodore Roosevelt withdrew 1,010,000 acres from the reservation for this purpose. 33 Stat. at 1070.

Perank and *Hagen* by their terms dealt only with the Uintah Reservation. The criminal conduct at issue in those cases took place in Myton, Utah, within lands opened for settlement under the 1902-1905 Acts. The Utah Supreme Court in *State v. Hagen* and *Perank*, and the U.S. Supreme Court in *Hagen*, did not need to address the forest lands and the Uncompahgre Reservation explicitly, and did not do so. In the Memorandum Decision, the District Court concluded that "there exists no direct conflict between *Ute Indian Tribe* and *Hagen, Perank*, or any other case regarding those lands." Aplt. App. Tab L, p. 262. The District Court therefore continued its injunction in effect with regard to those areas, precluding all exercises of state jurisdiction over Indians within the national forest and the Uncompahgre Reservation.

Although *Perank* and *Hagen* did not need to directly address the forest lands and Uncompahgre, there is in fact a direct conflict between the U.S. Supreme Court's decision in *Hagen* and *Ute Indian Tribe*. In *Hagen*, the Supreme Court made two clear holdings. First, statutory language restoring reservation lands to the public domain evidences congressional intent inconsistent with continued reservation status. 114 S. Ct. at 967. Second, the 1902 Act provided the operative language of restoration, with the 1905 Act simply extending the time for opening and providing a few other details. Id.

In *Ute Indian Tribe*, the Court of Appeals found that the national forest and Uncompahgre remained Indian country because, under its mistaken view of *Solem*, congressional restoration language did *not* evidence intent to disestablish, and because it felt that the 1905 Act superseded the 1902 Act in accomplishing the opening of the Uintah Reservation. With regard to the forest lands, Judge Doyle's lead opinion does not even mention the 1902 Act, instead assuming that only the 1905 Act was operative. Judge Seymour's concurring opinion is even clearer in its

reliance on both the mistaken *Solem* analysis and the 1905 statute: "Assuming the Uintah Reservation was never disestablished, nothing in the [1905 Act] amounts to explicit language of cession. . . . The Act merely contemplated the opening of the reservation to non-Indians. . . ." 773 F. 2d at 1099-1100. With *Hagen*'s ruling that the 1902 Act in fact did diminish the reservation, Judge Seymour's assumption fails.

In *Hagen*, the Supreme Court cited as supportive to its conclusions the minutes of Indian Inspector James McLaughlin's discussion with the Tribe in 1903, particularly his statement that "after next year there will be no outside boundary line to this reservation." 114 S.Ct. at 969. Inspector McLaughlin's statement is consistent with then Utah representative George Sutherland's statement that after the opening, it would be a waste of money to survey the outside boundary lines of the reservation, since those boundaries would no longer have relevance. 36 Cong. Rec. 1388 (Jan. 28, 1903), cited at 521 F. Supp. 1122. With the removal of these boundaries, the forest lands were simply not within the boundaries of the reservation.[15] The District Court's extensive historic analysis of the contemporary understanding that the forest lands would have public rather than Indian reservation status, see 521 F. Supp. at 1136-1141, must prevail in these circumstances, where the Court of Appeals' decision was based on the continuing existence of the boundaries.[16]

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[15] This is true even if the District Court's analysis of which fee lands remain Indian country is applied. The District Court held that the boundaries of the reservation were diminished to the boundaries of the individual allotments and the communal grazing reserve. Memorandum Decision at 18-19, Aplt. App. Tab L, pp. 187-188. The forest lands, unlike the grazing reserve, were not set aside for tribal use, and remained outside these diminished boundaries.

[16] Although subsequently silenced by order of the Department of Justice during the *Ute Indian Tribe* litigation, the U.S. Forest Service until that time had taken the formal position that the forest

With regard to the Uncompahgre Reservation, the *Ute Indian Tribe* court once again relied heavily on its belief that *Solem* had held that public domain language alone was insufficient to support disestablishment. 773 F. 2d at 1095. With only this legal conclusion—now determined to have been erroneous—as support, the Court of Appeals disregarded the District Court's detailed historical analysis of overwhelming evidence supporting the historic disestablishment of the Uncompahgre Reservation. See 521 F. Supp. 1100-1111.

One of the clearest statements of the reasons that the Uncompahgre Reservation was in fact terminated when opened by the Act of June 7, 1897, 30 Stat. 62 (the "1897 Act") comes from the United States Solicitor General, in contesting the Ute Tribe's motion to intervene in *Andrus v. Utah*, 446 U.S. 500, 100 S.Ct. 1803, 64 L.Ed. 458 (1980), a dispute over oil shale lands within the reservation:

> [I]n the view of the United States, the Tribe's claim that the Uncompahgre Reservation survives is both erroneous and irrelevant.
>
> The fact is that, for several decades at least, the Department of Interior has considered the Uncompahgre Reservation as disestablished. That remains its view today. Our own review of the evidence affords no basis for disagreeing with that conclusion. Of course, we may be wrong. But the court perhaps may accord some weight to the assessment of government officials who, although not insensitive to their special responsibility to support tribal claims, find themselves unable to do so in this instance.
>
> We simply list some of the impediments to the Tribe's claim: (1) Both in the abortive 1894 Act

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lands were on longer within the reservation. See Aplt. App. Tab T, pp. 328-332.

> and in the 1897 Act, Congress treated the Uncompahgre Reservation as a mere temporary asylum for the Ute Band of that name, denying them any claim to the proceeds derived from the sale of the surplus lands opened to entry; (2) in 1899 and 1903, after the Reservation was opened, it was referred to in legislation as in "the former Uncompahgre Indian reservation"; (3) in 1948, Congress extended the Uintah and Ouray Reservation by including lands situated within the boundaries of the former Uncompahgre Reservation, a futile act if the latter Reservation still subsisted; (4) in the same Act, Congress once again referred to the area as "the former Uncompahgre Indian Reservation" and nothing since 1948 indicates any Congressional change of mind; (5) in 1965, the Ute Tribe obtained a stipulated judgment in the Indian Claims Commission to compensate it for the failure of the United States to provide the Uncompahgre Band with a permanent Reservation; and (6) at no time since 1897 does it appear that the Department of the Interior (or any government agency) has treated the Reservation as still in existence. Perhaps these hurdles can be overcome. But, for us, the historic evidence compels the conclusion that the Uncompahgre Reservation no longer subsists.

Aplt. App. Tab S, pp. 323-325 (internal citations omitted).

After *Ute Indian Tribe*'s determination that the Uncompahgre reservation still existed, the United States asserted to the Supreme Court on the state's petition for certiorari that the Court of Appeals' decision on this point was incorrect:

> In the end, however, the court of appeals' analysis is unconvincing. In our view, the circumstances of the Uncompahgre Reservation contrast with those of the Uintah Reservation and "reveal a widely held,

> contemporaneous understanding" that the reservation would be established by the 1897 Act (*Solem*, 465 U.S. at 471). We therefore adhere to the view expressed in our memorandum . . . in *Andrus v. Utah*, 446 U.S. 500 (1980) . . . that the Uncompahgre Reservation was disestablished in 1897.

Aplt. App., Tab R., pp. 316-319.

D. *Sound Policy Reasons Support Withdrawal of the Mandate Not Only as to the Uintah Reservation, but also as to the Forest Reserve and Uncompahgre.*

The State of Utah is well aware of the prudential policies behind the law of the case doctrine. The case now before the Court, however, presents sufficiently unusual circumstances that departure from the law of the case rule is not only justified by law, but also conducive to judicial economy. As discussed in Section II.A. above, departure from the law of the case is justified where controlling authority has since made a contrary decision of the law applicable to the issues. Indeed, where the Supreme Court has issued a definitive ruling on the issue in the interim, the Court of Appeals may be obligated not to follow the previously established law of the case. *Hull v. Freeman*, 991 F. 2d 86, 90 (3rd Cir. 1993) (rather than follow opinion in prior appeal, Court of Appeals must follow different law established by subsequent Supreme Court decisions); *Colaizzi v. Walker*, 812 F. 2d 304, 310 (7th Cir. 1987).

The *en banc* decision in *Ute Indian Tribe* that the forest lands and uncompahgre had not been disestablished is based upon reasoning that has been completely undercut by the U.S. Supreme Court. Although the Tribe may argue that *Ute Indian Tribe* remains binding upon the State through the doctrine of collateral estoppel, thus preventing the State from exercising jurisdiction over Indians in these areas, it is clear that many cases may arise where the state is not a party. Although the national forest and

the Uncompahgre are sparsely populated, the enormous size of these areas and their substantial natural resources make it inevitable that these issues will surface on judicial dockets again and again. Certainly any Indian criminal defendant charged for conduct in these areas by the Federal Government under the Major Crimes Act, 18 U.S.C. § 1153, will assert the non-reservation status of these lands in light of *Hagen*. The issue will similarly arise in connection with tribal and state taxation, civil torts, and other unforeseeable matters. Were the Tribe's view followed, one rule of law—based upon *Ute Indian Tribe*—would apply to the State of Utah in these areas, while another rule entirely would apply to the federal government and many private parties. This Court now has the opportunity to correct fully its erroneous decision in *Ute Indian Tribe* concerning these areas, and prevent future uncertainty and litigation concerning these lands. By withdrawing its *en banc* mandate, and thus reinstating the original panel decision as the opinion of the Court, it can do so.

III. *THE DISTRICT COURT ERRED IN DETERMINING THAT CERTAIN CLASSES OF FEE LANDS REMAIN IN INDIAN COUNTRY NOTWITHSTANDING DIMINISHMENT OF THE RESERVATION BOUNDARIES.*

A. *Standard of Review.*

The District Court erroneously concluded that certain lands no longer held in trust by the United States for the tribe or individual Indians—most notably former allotments now held in fee simple—remain in Indian Country for jurisdictional purposes. The District Court's conclusion was based upon its determination that Congress' restoration of unallotted lands to the public domain through the 1902-1905 Acts left reservation boundaries diminished but intact around certain lands, including all allotments. The District Court's discussion of this issue is found at

pages 12-48 of the Memorandum Decision, and its ruling is found at page 96. Aplt. App. Tab L., pp. 181-217, 265.

In determining which lands remain within Indian country after the diminshment of the reservation, the Court of Appeals applies a *de novo* standard of review. *Pittsburg & Midway Coal Min. Co. v. Yazzie, supra,* 909 F. 2d at 1393-1394 ("*Yazzie*"). The existence and scope of reservation diminishment "is a matter of statutory construction which typically involves a *de novo* review. *Id.* at 1393.

B. *The District Court's Boundary Ruling.*

In his July 14, 1905 proclamation implementing the opening of the Uintah Reservation, President Theodore Roosevelt implemented Congress' opening of the reservation by declaring "that all the unallotted lands in said reservation . . . will on and after the 28th day of August, 1905 . . . be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States." 34 Stat. 3119-3120. In the years following this proclamation, some 400,000 acres of land permanently left federal ownership through the operation of the homestead and townsite laws, including "cash entry" sales authorized by the 1905 Act. Act of March 3, 1905, *supra,* 33 Stat. at 1070.

The District Court, the United States, and the Ute Tribe all concede that after *Hagen,* former reservation lands that were conveyed into fee ownership through these laws, and which have remained in fee ownership, are as a substantive matter not Indian country under 18 U.S.C. § 1151 (a). However, the District Court held that certain other classes of lands within the former reservation boundaries that have passed out of trust status remain Indian country notwithstanding fee ownership. These lands primarily are comprised of former allotments that have passed into fee simple status, but also include lands granted to Mixed-

Blood Utes pursuant to the Ute Partition Act, 25 U.S.C. §§ 677-677aa, and lands exchanged by the Tribe into fee status in the course of consolidating its landholdings. In contrast, the State believes that within the former Uintah Reservation boundaries, Indian country does not extend beyond the approximately 1.2 million acres of lands actually held in trust by the United States for the tribe and individual Indian allottees.

The District Court's rationale for still including fee lands within Indian country is based upon its conclusion that the relevant Congressional acts had diminished the boundaries of the reservation *only* to the extent of the opening. Mem. Dec. at 90-91. Under this theory, allotments and the tribal grazing reserve lands that were set aside at the time of the opening—none of which were available for non-Indian settlement—remained in formal reservation status, and had defined "boundaries" on a tract by tract basis. Under 18 U.S.C. § 1151(a), land within the limits of a reservation remains Indian country notwithstanding the issuance of a fee patent. The District Court therefore reasoned that since each parcel's limits were in effect reservation limits, the subsequent conveyance of these lands out of trust did not affect their Indian country status under § 1151(a). Mem. Dec. at 19, Aplt. App. Tab L, p. 169.

C. *The Indian Country Statute.*

The starting point of any analysis of what is or is not Indian country is 18 U.S.C. § 1151. As the Tenth Circuit has recently observed, "both the Supreme Court and this court have concluded that § 1151 defines Indian country for both civil and criminal jurisdiction purposes." *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F. 2d 1531, 1540-1541 (10th Cir. 1995). There are three ways that land can be Indian country under the statute. First and foremost, 18 U.S.C. § 1151(a) provides that lands

"within the limits" of an Indian reservation remain "Indian country" notwithstanding the issuance of any patent. This subsection is why reservation disestablishment cases have received so much attention from the Courts—non-Indian lands held in fee simple can be within Indian country for jurisdictional purposes if within the limits (e.g. the boundaries) of a reservation. Under 18 U.S.C. § 1151(b), land within "dependent Indian communities" is also within Indian country. *See generally Blatchford v. Sullivan,* 904 F. 2d 542, 544-549 (10th Cir. 1990). This issue is not now before the Court.[17] Under 18 U.S.C. § 1151(c), Indian country status further extends to "all Indian allotments, *the Indian titles to which have not been extinguished.* . . . " (emphasis added). This statute by its terms does not permit former allotments to be considered Indian country unless one of the other two subsections of § 1151 applies. Finally, the Courts have recognized that there may be tribal lands outside formal reservations, which do not fit exactly within either of the three categories set forth in § 1151. Lands of this type—held by tribes in restricted status or by the United States in trust for a tribe—are Indian country even though outside a reservation. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 511, 111 S. Ct. 905, 910, 112

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[17] The State does not dispute that certain areas within the former Uintah Reservation boundaries may qualify as dependent Indian communities, and thus for Indian country status under 18 U.S.C. § 1151(b). The dependent Indian community issue was deferred at the District Court level by agreement of the parties due to the factual nature of the inquiry involved. The state questions whether the issue is in fact properly before the District Court even upon a remand of this case, since the issue was never set forth in the Tribe's complaint in this action, and to the State's knowledge no pending controversy exists over the dependent Indian community status of any particular area. The State suggests that this issue is probably best resolved by negotiations or on a case by case basis when specific disputes arise, rather than by having the District Court undertake a generalized inquiry into the dependent Indian community status of the entire Uintah basin. See Mem. Dec. at 89.

L. Ed. 2d 1112 (1991); *United States v. John*, 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978).

D. *The District Court Ruling Takes Language In* Hagen *and Perank Out of Context.*

1. The District Court Analysis.

The District Court found that allotments and similar lands maintained in trust at the time the reservation was opened retained reservation status (e.g. not just Indian ownership) by focusing on *Hagen*'s specific holding on the restoration issue:

> [W]e hold that the restoration of unallotted lands to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the act diminished the reservation. . . .

114 S. Ct. at 967 (emphasis added). Similarly, the District Court looked to the Utah Supreme Court's phrasing of the issue in *Perank* as whether "operative stautory language opening a reservation would effect a diminishment of that reservation *as to the lands so restored,*" and its holding that Congress had intended to diminish the Reservation *"as to those lands restored to the public domain."* 858 P. 2d at 934 (emphasis added).

The District Court drew from these statements the conclusion that Congress had not meant to terminate the Uintah Reservation boundaries in their entirety, and that the remaining Reservation would consist not only of scattered individual Indian allotments but also the 250,000 acre grazing reserve that Congress had directed the Secretary of Interior to set aside for common tribal use. Mem. Dec. at 18-19. Since each of these individual reservation parcels would obviously have a property boundary

("limits"), sale of the parcel into fee status would not remove the parcel's Indian country status under § 1151 (a) ("lands within the limits of an Indian reservation notwithstanding the issuance of a fee patent").

2. The Court's Conclusions Are Directly Opposite The Prior Positions of All Involved.

Hagen and *Perank* were decided on the *identical* record used in *Ute Indian Tribe*. Aplt. App. Tab O, pp. 300-303. That record has been stipulated to be the same record now before the Court of Appeals. Pre-trial Order, Aplt. App. Tab J, p. 16. All of the courts that have been involved in the long history of this case have been asked to decide the same jurisdictional issue. The District Court's analysis, finding as it does that the diminishment of the reservation left scattered allotments as § 1151(a) reservation on a tract by tract basis, is directly opposite the position espoused by both the District Court and the Tribe itself throughout these proceedings.

In the initial *Ute Indian Tribe* litigation, the issue was the extent of the *exterior* boundaries of the reservation. 521 F. Supp. at 1075. The Tribe described the issue as an "all or nothing" one; if the District Court ruled against it on the existence of the exterior boundaries, Indian country would be limited to trust lands. Pretrial Memorandum of Ute Indian Tribe Dated July 31, 1979. As noted in Section II, the District Court held that were the 1902 Act to have been the operative statute, the reservation would be terminated. 521 F. Supp. at 1122. *Hagen* of course did find that the 1902 Act was the operative statute.

Even more instructive are the Tribe's statements *after Perank*. In seeking injunctive relief before the District Court, the Tribe asserted that *Perank* "holds that the Uintah Valley Reservation was disestablished, except for those lands which are held in trust by the United States for the benefit of the Tribe" and "would subject tribal members

who commit offenses off trust land to state criminal prosecution." Aplt. App. Tab D, p. 23-25. In *Hagen*, the Tribe had exactly the same understanding of what the Supreme Court was being asked to decide. The Tribe's Motion to Intervene in the Supreme Court proceedings states, *inter alia*:

> This case will determine for all time *the exterior boundaries of the Uintah & Ouray Reservation*. . . . [T]hose boundaries define the geographic parameters of the Tribe's governmental authority. . . .
>
> [T]he Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, finding that *the Reservation consists only of those lands held in trust by the United States for the Tribe or individual Indians.*
>
> [T]ribal members would, if the Reservation were to be adjudged diminished, be subject to criminal prosecutions in state court for infractions occurring on *non-trust lands of the Reservation.*

Motion of Ute Indian Tribe to Intervene As A Matter of Right, Applt. App. Tab U, pp. 334-337. (Emphasis added). The Tribe's brief as an amicus curiae makes the same point, while the United States has similarly asserted that *Perank* had disestablished the exterior boundaries of the Uintah and Ouray Indian Reservation. Aplt. App. Tab P. P. 305, n. 11; Doc. 10 at 2.

3. Perank and Hagen Did Not Leave Allotments Within The Reservation.

Based upon *Hagen*'s ruling that restoration language would effect a diminshment of the reservation "as to the lands so restored," the District Court concluded that the boundaries were diminished down to individual parcel boundaries around the retained allotments and grazing reserve. The District Court's decision understates the effect of the removal of the historic reservation boundaries by

the restoration of unallotted lands to the public domain. The *Hagen* court clearly contemplated that the exterior boundaries of the reservation would simply be gone; it favorably cited comments by the Department of the Interior's negotiator with the Ute Tribe in connection with the impending allotments, Indian Inspector James McLaughlin, who had explained the situation to the Tribe by stating *"after this year there will be no outside boundary line to this reservation."* 114 S. Ct. at 968 (italics in original). While the District Court correctly notes that Inspector McLaughlin went on to state that each individual allotment would have an outside boundary, it does not follow that these parcel boundaries can be equated with "reservation" boundaries for the purposes of § 1151(a).[18]

Where a reservation has been diminished, unallotted lands within the former reservation boundary lose their status as "Indian Country." In *United States v. Pelican*, 232 U.S. 442, 34 S. Ct. 396 (1914), the Supreme Court stated:

> [T]he original reservation was Indian Country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government. The same considerations, in substance, apply to the allotted lands which, when the reservation was diminished, were excepted from the portion restored to the public domain.

34 S. Ct. at 399. In other words, after diminishment trust allotments within the former reservation remain Indian Country because they are set aside for use by individual Indians. However, this status continues *only during the period that the allotments are held in trust.* 34 S. Ct. at 399.

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[18] In fact, the petitioner in *Hagen* expressly discounted this notion, stating: "the reference to individual boundaries replacing the outside boundary was not, as in *Rosebud*, to describe the new shape, size and location of the Reservation." Aplt. App. Tab Q p. 309.

The Tenth Circuit's *Yazzie* decision, *supra,* 909 F. 2d 1387, deals with the precise issue addressed by the District Court here:

> A question remains as to the current status of the *allotted* lands. Were they terminated from reservation status when the unallotted lands were restored to the public domain, or did they retain reservation status? Arguably, since only the unallotted lands were restored, the allotted lands remain unrestored, i.e. retain their reservation status. On the other hand, the allotted lands could not have been restored to the public domain for title purposes because they were allotted in severalty and had been disposed of; i.e. since they were no longer public lands, they obviously could not be restored for sale and settlement purposes.

909 F. 2d at 1420. *Yazzie* court reached the exact opposite conclusion as the District Court here with regard to the reservation status of retained allotments once surrounding lands were restored to the public domain; after restoration "[i]t does not hold that the remaining allotments are reservation; instead, they are Indian country by virtue of being allotments under 18 U.S.C. § 1151(c). 909 F. 2d at 1421.

Yazzie is directly applicable here. Congress diminished the Uintah Valley Reservation by restoring it to the public domain. With the removal of the former exterior boundaries, allotments have not been and are not now "within the limits" of a reservation. *See* 18 *U.S.C.* § 1151(a). Existing trust allotments remain Indian country under § 1151(c), but once Indian title to an allotment is extinguished, the parcel is no longer "Indian Country". This interpretation is supported by the language of § 1151(c) itself, which includes "all Indian allotments, *the Indian titles to which have not been extinguished* . . ." (emphasis added). See *United States v. Pelican, supra,* 34 S. Ct. at 399 (allotted lands retain Indian character for jurisdic-

tion purposes "during the trust period"); see also *United States v. A Juvenile*, 453 F. Supp. 1171 (D. S.D. 1978).

The District Court attempted to distinguish *Yazzie* by several arguments, none of which is ultimately convincing. First, it pointed to Congress' provision at the opening of 250,000 acres of communal grazing lands for use by tribal members as evidence that the reservation was not terminated. The retention of the grazing reserve, even were it a "reservation" has no bearing on the allotments. There is no evidence that the scattered allotments granted to tribal members were inside the upland grazing lands that made up the grazing reserve. See 521 F. Supp. at 1125, n.163. As in *Yazzie*, there was no reservation boundary surrounding them once the historic boundary was removed, eliminating § 1151(a) as a source of jurisdiction. See also *Indian Country U.S.A. v. Oklahoma Tax Comm'n.*, 829 F. 2d 967, 975 n. 3 (10th Cir. 1987) (non-Indian lands remain Indian country under § 1151(a) until the surrounding portion of the reservation is disestablished). Second, the fact that *Yazzie* was remanded to determine the Indian country status of the subject lands under 18 U.S.C. §§ 1151(b) or (c) supports the State's position here; the issue before the Court is whether § 1151(a) applies. Finally, the District Court makes an erroneous and misleading analogy to the diminishment of the Rosebud reservation, citing *Beardslee v. United States*, 541 F. 2d 705 (8th Cir. 1976). The District Court cites *Beardslee* for the proposition that a former allotment within a diminished reservation remains Indian country under § 1151(a). Mem. Dec. at 34-34, Aplt. App. Tab L, pp. 203-204. In fact, in *Beardslee* the court's holding was based upon the fact that the historic reservation boundaries there had *not* been disestablished. For those portions of the Rosebud Reservation where, as here, the exterior boundaries had been diminished, the Supreme Court has come to the opposite conclusion as the District Court here. In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S. Ct.

1361 (1977), the dissent argued that Indians residing in the opened area would be subject to all otherwise applicable state laws, rather than tribal law. 97 S. Ct. at 1385. The majority opinion rebutted this claim by noting that this would not be true *to the extent tribal members were residing on allotment,* because those allotments, although outside the diminished reservation, were Indian country under 18 U.S.C. § 1151. 97 S. Ct. at 1377, n.48. This is a clear indication that within a diminished reservation, as here, Indian country status is based upon current Indian title (e.g. § 1151(c)), rather than the boundaries of particular parcels.

The District Court's analysis also rests upon the belief that the State of Utah is arguing that the Uintah Reservation has been terminated. That is not the case. Although the state believes that the historic boundaries of the reservation were eliminated, it does not dispute that as a practical matter, the reservation remained. At the time of the opening, Congress set aside not only the 250,000 acre communal grazing reserve, but also lands for the federal Indian agency, and similar lands. See 521 F. Supp. at 1125 n. 163. These lands have commonly been referred to as the reservation, but they remain as Indian country not because they are "within the limits of a reservation" under § 1151(a), but rather because they have been set aside by the United States in trust for the Tribe. See *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* supra. Judge Seth's dissent to the *en banc* decision in *Ute Indian Tribe* correctly recognized this to be the case. 773 F. 2d at 1105.

4. The District Court Approach Would Require Tractbook Searches For All Activities Involving Fee Lands In The Entire Uintah Basin.

The District Court also concluded that its application of § 1151(a) to former allotments would serve to lessen the burden on governmental and law enforcement agencies

caused by "checkerboarding" of jurisdictional boundaries. In this the Court is incorrect. For more than eighty years prior to *Ute Indian Tribe,* jurisdiction was based upon the status of particular lands as either trust lands, a well understood and easily made determination generally not requiring a tractbook search. Under the court's approach, a determination that a particular crime or event took place on fee lands anywhere within the former boundaries would *inevitably* require a tractbook search, since the court finds that jurisdiction follows how the land was originally patented, rather than its easily determined Indian status. The delineation of Indian country by trust/non-trust status is not only the correct legal standard, it is by far the simplest method of resolving jurisdictional boundaries in the aftermath of *Hagen.*

CONCLUSION

In *Hagen,* the United States Supreme Court held that Congress diminished the Uintah Reservation by means of the 1902-1905 Acts. As the Ute Tribe repeatedly stated in that case, a finding by the Supreme Court that Congress had diminished the reservation necessarily meant that its jurisdictional powers were limited to trust lands. The Supreme Court has so decided.

Notwithstanding the Supreme Court's clear and final resolution of the jurisdictional issue, the District Court has indefinitely enjoined the State of Utah from asserting jurisdiction within the expansive historic boundaries set by this Court in the *en banc* decision in *Ute Indian Tribe.* The injunction continues even though the District Court has itself recognized that large portions of the lands in question are *not* Indian country, because the District Court believes itself bound by the mandate in *Ute Indian Tribe.* Yet after *Hagen,* the *Ute Indian Tribe* case has been (as this Court has itself said in *Cuch*) "effectively overruled." The Court of Appeals' rulings in *Ute Indian Tribe* on the jurisdictional status of the Uintah Reservation, the Forest

Reserve, and the Uncompahgre Reservation rested upon the premises that statutory restoration language did not strip lands of reservation status, and that the 1902 Act did not provide the operative means of opening the Uintah Reservation. Both premises were expressly rejected in *Hagen*. Because the *en banc* decision in *Ute Indian Tribe* is no longer viable as to any issues decided therein, the Court of Appeals should:

1. Recall the *en banc* mandate in *Ute Indian Tribe* and substitute as the mandate of the Court of Appeals the correctly decided initial panel decision in that case;

2. Reverse the District Court's decision to continue the Injunction Order in effect outside lands held in trust by the United States for the tribe and individual tribal members; and

3. Remand the case to the District Court with directions to dismiss the Tribe's Motion for Permanent Injunctive Relief with prejudice, and to grant the State and Local Defendant's Motion to Dissolve the Injunction Order.

REQUEST FOR ORAL ARGUMENT

The State of Utah requests oral argument in this appeal. This case has a complicated procedural history which oral argument may help illuminate, and involves important public issues. In its Motion for Recall of the mandate in *Ute Indian Tribe*, the State of Utah has suggested that the Court consider this matter *in banc*, since the *Ute Indian* Tribe case was decided by the Court of Appeals sitting *in banc*.

DATED this 17th day of June, 1996.

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APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-4073

UTE INDIAN TRIBE of the Uintah and Ouray Reservation, Utah,
Plaintiff/Appellee,

v.

STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,
Defendants/Appellants,

UNITED STATES OF AMERICA,
Amicus Curiae.

APPELLANT STATE OF UTAH'S MOTION FOR ADDITIONAL TIME FOR ORAL ARGUMENT

Appellant State of Utah hereby moves the Court for an additional fifteen (15) minutes of Oral Argument time in this matter (which is set for Tuesday, September 10, 1996), based on the following grounds:

1. This case raises complex issues of exceptional importance to the State of Utah and additional argument time is necessary to fully apprise the Court in this matter.

2. This case involves a long procedural history, culminating in a Mandate of the United States Supreme Court

which is now the issue here. The resolution of this case will have long-term ramifications to the extent of federal, tribal, state and local jurisdiction in the eastern part of Utah.

3. This case is before the Court not only on appeal from the lower court, but also on the State's motion to have this Court reconsider and recall its previously-issued Mandate in *Ute Indian Tribe v. State of Utah, et al.*, 773 F.2d 1087 (10th Cir. 1985) (*en banc*) cert. denied, 479 U.S. 994 (1986).

4. Because this case is the last matter scheduled to be heard on September 10, 1996, the requested additional time will not unduly disrupt the Court's calendar.

Counsel for Appellee Ute Indian Tribe was contacted regarding this request for additional time, and Appellee Ute Indian Tribe is opposed to the granting of any additional time for Oral Argument; nevertheless, we believe such additional time will benefit the Court.

Therefore, Appellant State of Utah respectfully requests that an additional fifteen minutes of Oral Argument time (for a total of thirty minutes per side) be granted.

Respectfully submitted this 29th day of August, 1996.

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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
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No. 96-4073

UTE INDIAN TRIBE of the Uintah
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STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,
Defendants/Appellants,

UNITED STATES OF AMERICA,
Amicus Curiae.

(Oral Argument Scheduled On)
Tuesday, September 10, 1996)

On Appeal from the United States District Court
for the District of Utah,
Honorable Bruce S. Jenkins, Senior Judge

REPLY BRIEF OF APPELLANT
STATE OF UTAH

I.

INTRODUCTION

The State of Utah is before the Court of Appeals seeking implementation of the U.S. Supreme Court's decision in *Hagen v. Utah*, 510 U.S. 399, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994) ("*Hagen*"), and withdrawal of this Court's inconsistent mandate in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. den. 479 U.S. 994 (1986) ("*Ute Indian Tribe*"). The District Court, while recognizing the direct conflict between the Supreme Court's definitive ruling and *Ute Indian Tribe*, has continued for over two years to enjoin the State from exercising governmental authority over three million acres of non-Indian lands on the basis of the latter, now discredited, decision.

The Ute Indian Tribe seeks to make the District Court's injunction permanent. The State would be prevented prospectively and indefinitely from undertaking any criminal prosecutions of Indians (or exercising civil jurisdiction over a broad range of activities conceivably affecting Indians) on non-Indian lands within the vast original boundaries of the Uintah and Uncompahgre Reservations, an area populated overwhelmingly by non-Indians.

The Tribe's position, based upon the purported collateral estoppel effects of *Ute Indian Tribe*, is simple: "the Supreme Court's rule in *Hagen* is of no relevance to the resolution of the issues before this Court." Corrected Brief of Appellee Ute Indian Tribe ("Ute Tribe Brief") at 34. The State of Utah respectfully disagrees. The Supreme Court has "effectively overruled" *Ute Indian Tribe*, and that case does not provide a basis for continuing to enjoin the State and its subdivisions from the legitimate exercise of jurisdictional authority on non-Indian lands within the former reservation boundaries.

The Tribe's brief neglects two crucial consequences of the Tribe's position. First, this Court has held that after *Hagen* the United States does not have jurisdiction to prosecute Indians within the diminished Uintah Reservation, because those lands are not "Indian country" under 18 U.S.C. § 1151. *United States v. Cuch,* 79 F. 3d 987 (10th Cir. 1996), *cert. pending.* ("*Cuch*"). The United States, in its brief amicus curiae in this proceeding, similarly indicates that the Uncompahgre Reservation was disestablished and thus is not in its view Indian country. If the State of Utah is enjoined from exercising jurisdiction over non-Indian lands where the United States has no statutory authority to act, there will be vast areas of Utah where no sovereign may prosecute Indian felonies.

Second, the Tribe indulges in the fiction that simply disregarding *Hagen* and maintaining *Ute Indian Tribe* in place between the parties will mean an end to the dispute over what is and is not Indian Country. In fact, this issue arises in varied contexts unrelated to the *state's* exercise of jurisdiction, including civil torts, federal prosecutions under the Major Crimes Act,[1] tribal taxation, and tribal environmental regulation off tribal lands. *Hagen* provides a rule of decision in these cases directly opposite in both reasoning and conclusion to every aspect of *Ute Indian Tribe.* Even were the Court of Appeals to accept the Tribe's convoluted procedural argument that the State of Utah is collaterally estopped from relying upon *Hagen,* the Court would be faced with the substantive jurisdictional issue again and again until it ruled on the merits as to both the Uintah and Uncompahgre Reservations. In this situation, withdrawal of the entire mandate in *Ute Indian Tribe* is both legally justified and conducive to justice and judicial economy.

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[1] 18 U.S.C. § 1153.

II.

PROCEDURAL ISSUES

A. *The True Issue Before the Court Is Whether the Mandate In Ute Indian Tribe Should Be Recalled Rather than Res Judicata.*

The Tribe devotes 24 pages of argument to its claim that the State of Utah is barred by principles of res judicata from relitigating the reservation boundary issues decided in *Ute Indian Tribe*. The Court of Appeals need not even reach the res judicata issue.[2] The District Court recognized the fundamental incompatibility between the *Ute Indian Tribe* decision and *Hagen*, and invited the Court of Appeals to recall its mandate in the former case for reconsideration. Aplt. App. Tab L, p. 269. Concurrently with this appeal, the State of Utah has moved pursuant to Fed. R. App. P. 27 for withdrawal of the *Ute Indian Tribe* mandate and its replacement with the correctly decided original panel decision in this case. *See Ute Indian Tribe v. State of Utah*, 716 F. 2d 1298 (10th

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[2] The Tribe devotes a substantial part of its argument to discussion of *Federated Department Stores v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed. 103 (1981). The Tribe contends that *Moitie* conclusively establishes that neither a subsequent change of law nor public policy considerations will ever permit a Court to depart from a prior judgment. *Moitie* notwithstanding, federal courts have continued to hold that application of res judicata is a discretionary doctrine, and that changes of controlling law make application of res judicata inappropriate. *FLRA v. U.S. Dept. of the Treasury*, 884 F. 2d 1446, 1456 (D.C. Cir. 1989). Similarly, in *State v. Perank*, 858 P. 2d 927 (Utah 1992), the Utah Supreme Court noted that even were res judicata applicable against the State, it would exercise its unquestioned discretion to address the diminishment issue, because of the public interest in resolving the issue once and for all. 858 P. 2d at 931, n.3. Finally, the Tribe's res judicata arguments fail to state that it is seeking prospective relief in the form of a permanent injunction, a situation where preclusion principles have limited utility. See Section II.D.

Cir. 1983).[3] If the Court of Appeals modifies the *Ute Indian Tribe* mandate, then the prior mandate would, of course, lose any res judicata effect that it might otherwise have. This case accordingly hinges not on res judicata principles, but on the law of the case doctrine.

B. *The Supreme Court's Intervening Decision In Hagen Requires the Court to Withdraw the Mandate In Ute Indian Tribe.*

The Court of Appeals has the inherent power to recall a prior mandate where controlling law has since made a contrary decision of the law applicable to the issues at bar. *Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F. 3d 1531, 1536 n. 4 (10th Cir. 1995). In its principal brief, the State cited authority for the proposition that where the Supreme Court has issued an intervening decision contrary to the prior appellate mandate, that mandate must give way. Brief of Appellant State of Utah ("State Brief") at 24-25, citing *EEOC v. K-Mart Corp.,* 796 F. 2d 139, 146 (6th Cir. 1986); *Higgins v. California Prune & Apricot Growers,* 3 F. 2d 896, 987-898 (2d Cir. 1924).

The Tribe attempts to distinguish these cases by their procedural posture at the time of the intervening Supreme Court decision, noting that in both cases the Supreme Court decision came while the case was on remand to the District Court from an initial appeal and therefore not final. Ute Tribe Brief at 31, n. 20. The Tribe argues that there was a final judgment in *Ute Indian Tribe* once certiorari was denied by the Supreme Court, and that the finality of the judgment precludes the Court of Appeals from reconsidering its mandate in later proceedings in the same case. *Id.* This distinction is not valid. The Tenth

[3] The United States, in its brief as *amicus curiae,* has similarly suggested the partial withdrawal and modification of the mandate, although it disagrees with the State on the extent of the modification.

Circuit has granted relief from a prior and final judgment where relevant case law has been changed by the U.S. Supreme Court in the interval. *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F. 2d 696, 702 (10th Cir. 1989) ("In this circuit, a change in relevant case law by the United States Supreme Court warrants relief under Fed. R. Civ. P. 60(b)(6)"); *Pierce v. Cook & Co.*, 518 F. 2d 720, 722-24 (10th Cir. 1975), *cert. denied* 423 U.S. 1079, 96 S. Ct. 866, 47 L. Ed. 2d 89 (1976); *see also Minnis v. U.S. Department of Agriculture*, 737 F. 2d 784, 786 n. 1 (9th Cir. 1984) (final judgment in prior action with full mutuality of parties given no effect in light of intervening Supreme Court decision).

C. *Full Withdrawal of the Mandate Is Justified Here.*

The true issue before the Court of Appeals is not the finality of the *Ute Indian Tribe* decision. It is instead whether, in light of *Hagen*, the circumstances of this case merit withdrawal of the *Ute Indian Tribe* mandate. Those circumstances include the following:

(1) The U.S. Supreme Court decided the reservation disestablishment issue in *Hagen* on the *identical* record used in *Ute Indian Tribe*, notwithstanding the Tribe's incredible contention that the cases are unrelated. See Aplt. App. Tab O.

(2) The Supreme Court in *Hagen* expressly repudiated the reasoning used by the Tenth Circuit to find no diminishment in *Ute Indian Tribe*, not only with regard to the Uintah reservation but also with regard to the forest lands and the former Uncompahgre reservation. The Tribe is seeking permanent injunctive relief for all three areas, a drastic remedy which merits full examination by the Court of Appeals concerning the continuing viability of *Ute Indian Tribe*.

(3) The jurisdiction of the United States to prosecute Indian crimes is dependent upon whether the

lands in question are Indian country under 18 U.S.C. § 1151. Indian country status must be proven by the United States as a jurisdictional predicate of a federal Indian prosecution. *United States v. Torres*, 733 F. 2d 449 (7th Cir. 1984), *cert. denied* 469 U.S. 864, 105 S. Ct. 204. This Court implicitly held in *Cuch* that the United States could not undertake such prosecutions in the areas disputed here. Where Indian Country status is clearly not present (the diminished Uintah) or has been disavowed by the U.S. (the Uncompahgre) a jurisdictional vacuum could well be created.

(4) The issues are of substantial public importance, which will arise time and again in a multiplicity of contexts unless now resolved by the Court. See Brief for the United States as Amicus Curiae (the "United States Brief") at 11, n. 8 (where issues of public importance that touch on continuing conduct are involved, recall of mandate is justified).

The State submits that these circumstances are sufficiently extraordinary that reconsideration of the mandate is an appropriate remedy.

D. *The Tribe's Requested Remedy—Permanent Injunctive Relief—Is Inappropriate Where Applicable Law Has Changed.*

This appeal is from the District Court's decision to continue the existing injunction prohibiting—with limited exceptions—the State from exercising criminal and civil jurisdiction over Indians anywhere within the expansive *Ute Indian Tribe* boundaries, pending this Court's decision concerning the mandate. The Tribe seeks to make this injunction permanent, and to broaden its scope to preclude state felony prosecutions of Indians within the historic reservation boundaries. Ute Tribe Brief at 50. In seeking this prospective relief, the Tribe goes as far as asking the Court of Appeals to order the Utah Supreme

Court to withdraw its remittitur in *Hagen*, notwithstanding the U.S. Supreme Court's affirmance of the Utah court in that case. Ute Tribe Brief at 18.

The Tribe relies upon the "finality" of the *Ute Indian Tribe* judgment, claiming that that judgment collaterally estops the State from applying *Hagen* to the State's relationships with the Tribe and its members. Ute Tribe Brief at 14. The Tribe goes on to argue that *Hagen* cannot be applied "retroactively" to govern the relationship between the State and the Tribe. Ute Tribe Brief at 29-31. Although the Tribe's reliance upon the collateral estoppel effects of *Ute Indian Tribe* is misplaced, for reasons discussed elsewhere in the State's principal brief and this filing, the Tribe's arguments have a more serious flaw. The Tribe is seeking prospective relief—a permanent injunction preventing the future exercise of jurisdiction by the State and its subdivisions within the historic reservation boundaries. Whatever the merits of the Tribe's collateral estoppel claims, using a now "effectively overruled" decision as the basis for permanent federal court supervision into the indefinite future cannot be justified.

The Supreme Court has recognized that in cases where future injunctive relief is involved, "[a] balance must be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances." *System Federation No. 91 v. Wright*, 364 U.S. 642, 647-48, 81 S. Ct. 368, 371, 5 L. Ed. 2d 349 (1961). A change in law may require modification of an existing injunction. *Id.* Where the legal basis for an existing injunction has disappeared, it is an abuse of discretion for the District Court to refuse to lift the injunction. *Cablevision of Texas v. Oklahoma Western Telephone Company*, 993 F.2d 208 (10th Cir. 1993); *American Horse Protection Ass'n v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982) ("When a change in the law authorizes what had previously been forbidden it is abuse of discretion for a court to refuse to modify an injunction founded on the superseded law").

The State does not seek to "retroactively" apply *Hagen*, in that it does not seek to disturb actions that took place in reliance upon *Ute Indian Tribe*. The Tenth Circuit took this position when it chose in *Cuch* not to invalidate federal criminal convictions of Indians in areas determined by *Hagen* to be outside Indian country. Similarly, the State will not seek to disturb actions taken while the District Court's injunction has been in place, a concern raised by the United States. *See* United States Brief at 13, n. 10. Instead, the State of Utah believes that *Hagen* must be given prospective effect, in the form of an order withdrawing the *Ute Indian Tribe* mandate, and denying the Tribe's request for permanent injunctive relief based thereon.

E. *The Tribe Has "Opened the Door" To A Reconsideration of the Entire Ute Indian Tribe Mandate, Because It Seeks Permanent Injunctive Relief In All Areas Addressed By That Decision.*

The Tribe seeks to have the Court of Appeals enter an Order permanently enjoining the State from exercising jurisdiction inconsistent with the *Ute Indian Tribe* decision, not only with regard to the interior Uintah Reservation, but also the national forest lands and the former Uncompahgre reservation. As noted above, the grant of prospective injunctive relief must be based upon current rather than superseded law. While *Hagen* did not directly rule upon the Indian Country status of the National Forest and the Uncompahgre, it did completely reject the rationale employed by the *Ute Indian Tribe* court in concluding that those areas remained Indian Country. *See* State Brief at 32-38. Since the Tribe seeks to have the Court of Appeals decide whether the State will prospectively be enjoined from exercising jurisdiction in these areas, it is entirely appropriate for the Court of Appeals to determine whether *Ute Indian Tribe* remains good law, irrespective of its prior mandate.

F. *Withdrawal of the Ute Indian Tribe Mandate Would Not Endanger Other Settled Decisions Concerning the Status of Existing Reservations.*

The Tribe argues that, if its res judicata arguments are not accepted, the reservation status of any Indian reservation could be relitigated at will. Ute Tribe Brief at 27. This fear is not well founded. The State seeks the withdrawal of the mandate in *Ute Indian Tribe* because it believes that that case was incorrectly decided, and in particular because the opinion relied almost wholly on the mistaken conclusion that *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161 (1984) ("*Solem*"), changed the law of reservation disestablishment by minimizing the effect of statutory language restoring reservation lands to the public domain. This Court recognized in *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400, cert. denied 498 U.S. 1012 (1990) that *Ute Indian Tribe* was "unexamined and unsupported in the opinion." The *Hagen* court similarly noted that *Ute Indian Tribe* was unique in its erroneous conclusion on the restoration issue. 114 S.Ct. at 967.

Hagen did not change the larger law of reservation disestablishment; rather, it corrected an erroneous decision by a lower court. In effect, the State is not seeking to apply new principles of law here, but to apply existing principles that were wrongly interpreted in *Ute Indian Tribe*. This effort does not endanger judicial determinations as to other reservations made under applicable principles of disestablishment jurisprudence.

III.

NON-INDIAN LAND WITHIN THE FORMER RESERVATION BOUNDARIES DO NOT CONSTITUTE INDIAN COUNTRY

A. *The Indian Country Statute Is Controlling.*

Within the former Uintah Reservation, the primary issue before the Court of Appeals is what non-Indian (i.e. fee) lands are nonetheless Indian country under 18 U.S.C. § 1151. *See Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993) (primary definition of Indian country is 18 U.S.C. § 1151). Under this statute, the *only* relevant way that lands not held in trust by the United States for the Tribe or individual Indian allottees can be considered Indian country is if they are "within the limits of any Indian reservation". 18 U.S.C. § 1151(a). The State has always contended that, with the elimination of the exterior boundaries of the reservation in 1905, fee lands cannot be considered Indian country, and tribal jurisdiction is coextensive with trust status.

Aside from its collateral estoppel arguments, the Tribe concedes that non-trust "fee" lands that were homesteaded or purchased when the Uintah Reservation was opened in 1905 are no longer Indian country, unless subsequently reacquired by the Tribe and placed in trust. Ute Tribe Brief at 39-40. The United States concurs in the view that such lands are not Indian country. United States Brief at 12-13. These concessions of necessity mean that such lands are not "within the limits" of a reservation pursuant to § 1151(a). Yet the Tribe goes on to make the completely incompatible argument that other fee lands within the former reservation boundaries are in fact "within the limits" of the reservation by virtue of *how* the lands left trust status.[4]

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[4] Certain lands allotted to individual tribal members upon the opening of the Uintah reservation have over the years passed out

The Tribe's argument focuses on the narrow language of the respective holdings in *State v. Perank*, 858 P.2d 927 (Utah 1992) ("*Perank*") and *Hagen*. In *Perank*, the Utah Supreme Court held that language in the 1902 Act[5] restoring reservation lands to the public domain terminated reservation status as to those lands restored. 858 P.2d at 934. In *Hagen*, the U.S. Supreme Court held that the restoration of unallotted reservation lands to the public domain evidenced congressional intent with respect to those lands inconsistent with continued reservation status. 510 U.S. at 414, 114 S. Ct. at 967. The Tribe claims that these holdings limit the effect of the diminishment to restored lands, effectively plucking them from the reservation, while leaving the external boundaries intact. Ute Tribe Brief at 43. Thus, when other former trust lands—primarily Indian allotments that have been conveyed into fee ownership—left trust status, the lands would still be "within the limits" of a reservation, and Indian Country under § 1151(a).

The Tribe's argument, while correctly stating the holding in *Perank* and *Hagen*, disregards the primary *consequence* of restoring all unallotted lands to the public domain—that the exterior boundaries of the Uintah reservation no longer existed. This in turn leads to the conclusion that fee lands, however leaving trust status, are no longer "within the limits" of a reservation, a necessary prerequisite to Indian country status. The Supreme Court clearly recognized that the exterior boundaries of the Uintah reservation no longer had any legal significance once the Reservation had been opened. The Court

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of trust status, and are now held in fee simple. The Tribe has also sold or exchanged other former trust lands, with the result that the conveyed lands passed into fee simple. Finally, the Tribe conveyed certain former trust lands to Mixed-Blood Utes in fee simple pursuant to the Ute Partition Act, 25 U.S.C. §§ 677-677aa. It is these fee simple lands that the Tribe contends are somehow still "within the limits" of a reservation.

[5] Act of May 27, 1902, 32 Stat. 263.

cited approvingly to the contemporary understanding, reflected in the minutes taken by Indian Inspector James McLaughlin, that "*after next year there will be no outside boundary line to this reservation.*" 510 U.S. at 417, 114 S. Ct. at 968. Without outside boundary lines, there is no basis for the Tribe's assertion that non-Indian lands are "within the limits" of a reservation, a necessity for a finding that such lands are Indian country under § 1151(a).

B. *The Tribe's Inconsistent Prior Position Exposes The Flaws In Its Reasoning Here.*

Both the State and the local appellants have pointed out the Tribe's multiple statements to various courts that, if *Perank* and *Hagen* were decided against it, tribal jurisdiction would be coextensive with trust lands. State Brief at 43-44; Brief of Duchesne County at 19-33. The Tribe's brief conveniently fails to distinguish or even mention these statements, which of course are utterly inconsistent with its current assertion of jurisdiction over non-trust fee lands. What the Court of Appeals should note is that the very same holding in *Perank* that the Tribe now claims is limited to opened lands was addressed fully by the Tribe both before the District Court and the Supreme Court. In seeking injunctive relief before the District Court, the Tribe asserted that *Perank* "holds that the Uintah Valley Reservation was disestablished, except for those lands which are held in trust by the United States for the benefit of the Tribe" and "would subject tribal members who commit offenses off trust land to state criminal prosecution." Aplt. App. Tab D, p. 23-25. In *Hagen*, the Tribe similarly stated:

> This case will determine for all time *the exterior boundaries of the Uintah & Ouray Reservation* . . . . [T]hose boundaries define the geographic parameters of the Tribe's governmental authority . . . .

and

> [T]he Utah Supreme Court held that the Uintah Valley Reservation had been diminished by its opening to settlement, finding that *the Reservation consists only of those lands held in trust by the United States for the Tribe or individual Indians.*

Aplt. App. Tab U, pp. 334-337.

This is the same position taken by the District Court in its 1981 opinion, in which it stated that if the 1902 Act had been the operative statute (which *Hagen* held to have been the case), the reservation would have been terminated. *Ute Indian Tribe v. State of Utah*, 521 F. Supp. 1072, 1122. The District Court viewed the jurisdictional question before it as being one of trust vs. non-trust lands. 521 F. Supp. at 1079. To claim that *Hagen* and *Perank* —decided on the identical record as *Ute Indian Tribe*— were somehow deciding a different issue is disingenuous and contrary to all prior claims of the parties.

C. *The United States' Position Also Erroneously Assumes the Exterior Boundaries Remain Intact.*

The United States also completely fails to address the core issue of the exterior boundaries of the reservation. Although it told the U.S. Supreme Court that *Perank* had *disestablished* the exterior boundaries of the Uintah Reservation,[6] the United States brief before this court says nothing about the exterior boundaries, instead stating that *Hagen* merely removed opened lands from the reservation. This is a crucial omission, because the "limits" of the reservation are what determine Indian country. Being charitable to the United States, it can be assumed that it adopts the Tribe's position that Congress had simply excised the opened lands from the reservation, while leav-

[6] See Brief of Appellant Duchesne County at 22,26. Duchesne County's Brief primarily addresses issues involving fee lands and the national forest lands, while the Brief of its co-appellant Uintah County addresses the Uncompahgre issue.

ing the historic boundaries otherwise intact. Yet this position is incompatible both with *Hagen* ("there will be no outside boundary line to this reservation") and the United States' argument to the Supreme Court that *Perank* had disestablished the exterior boundaries.

It is important for the Court of Appeals to note that the position of both the Tribe and the United States is essentially incompatible with that taken by the District Court in its Memorandum Decision. The District Court observed that the historic exterior boundaries of the Uintah Reservation simply no longer existed, but held that those boundaries had been diminished to the individual perimeters of the communal tribal grazing reserve and related lands, as well as to the boundaries of individual allotments. Memorandum Decision at 18-20. Under the District Court's analysis, those individual boundaries form the "limits" of the reservation for purposes of § 1151(a).

Although the State disagrees with the District Court's ultimate conclusion,[7] the District Court's opinion at least recognizes that § 1151 is the controlling authority here, and that the exterior boundaries no longer exist. The United States' analysis simply ignores its own statements regarding *Perank* and the clear language of *Hagen* that

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[7] The District Court's analysis—that when the exterior boundaries were done away with, the reservation boundaries shrank to the tract boundaries or multiple individual parcels—is unsupported by any disestablishment case. The State does not contest that these lands, when still in trust, are Indian country. Where the parcels were communal, e.g. the tribal grazing reserve, the lands are Indian country even though not specifically within § 1151. *See Buzzard v. Oklahoma Tax Comm'n, supra*, 992 F. 2d at 1076 (Supreme Court has recognized that land "validly set apart" for Indians may be Indian country even if § 1151 inapplicable). For allotments, the parcels are Indian country under § 1151(c) so long as trust status continues. Yet in both cases, once trust status ends, Indian country status ceases. This position is entirely consistent with the prior positions of the District Court, the Tribe, and the United States.

the historic reservation boundaries have no further relevance.

D. *The United States' Analysis Is Flawed With Regard to Former Allotments.*

A substantial portion of the disputed fee lands are former allotments that over the years have passed into fee status, and are no longer held in trust by the United States for tribal members. Former allotments are expressly addressed in 18 U.S.C. § 1151(c), which provides that Indian Country status extends to Indian allotments, "the Indian titles to which have not been extinguished." The former allotments in dispute here have had their Indian titles extinguished, so they cannot be considered Indian country under § 1151(c). Thus, only if such former allotments are "within the limits" of a reservation under § 1151(a) can they be considered Indian country.

The United States argues that former allotments in the Uintah Reservation have Indian country status under § 1151(a), because *Hagen* simply removed opened lands from the existing reservation—in other words that the historic boundaries remain with some excisions, keeping allotments within the limits of the reservation. Yet if the Court of Appeals recognizes *Hagen*'s actual conclusion that the historic boundaries are gone, it will reach the decision that the scattered individual allotments are therefore outside any remaining reservation boundaries. As long as those allotments stay in trust status, they are Indian country under § 1151(c), but once their Indian title is extinguished, they become subject to state jurisdiction. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S. Ct. 1361, 1377 n. 48 (1997) (allotments outside diminished but still existing reservation boundaries are Indian country by virtue of trust status).[8]

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[8] The United States cites the State's Petition for Writ of Certiorari in *Ute Indian Tribe*, in which the State agreed that remain-

E. *The Court of Appeals Should Determine The Indian Country Status of the Forest Lands.*

The Tribe does not address the substantive issue of whether the former tribal lands added to the Uinta Forest Reserve (now the Uinta and Ashley National Forests) by the 1905 Act [9] were in fact removed from the Reservation. Rather, the Tribe argues in its response to the State's motion to recall the *Ute Indian Tribe* mandate that *Hagen* did not address those lands, and so the *Ute Indian Tribe* ruling should be left intact with regard to the national forest lands.

In its principal brief, the State discussed why *Hagen* did in fact address the national forest lands. State Brief at 32-35. Although the District Court had originally concluded that Congress intended that the 1905 Act strip the lands of reservation status when they were added to the National Forest, 521 F. Supp. at 1136-1141, the *Ute Indian Tribe* court concluded that *because the exterior boundaries of the Uintah Reservation remained intact,* the national forest lands were still Indian country. 773 F. 2d at 1099-1100. With the elimination of the historic boundaries, the national forest lands cannot be considered to be "within the limits" of a reservation, and are thus not Indian country under 18 U.S.C. § 1151(a).

The United States argues that *Hagen* is not in tension with *Ute Indian Tribe*'s decision concerning the national forest. United States Brief at 14. This argument is incorrect. *Ute Indian Tribe* held that the forest lands remained Indian country because the exterior boundaries

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ing trust lands were Indian country under § 1151(a) and (c). United States Brief at 15. There is nothing inconsistent between this argument and the State's position concerning former allotments. Existing trust allotments are Indian country under § 1151(c), but under that statute they lose that status once Indian title is extinguished.

[9] Act of March 3, 1905, 33 Stat. 1069.

remained intact. *Hagen* removed those boundaries.[10] The United States' position on this issue is simply untenable. This remains true even if the District Court's analysis is followed. The boundaries shrank—were diminished—to the remaining tribal and allotted lands. These boundaries, of course, did not include the national forest lands, which thus cannot be considered Indian country under § 1151(a).

The same considerations that compel the recall of the mandate with regard to the rest of the Uintah Reservation and the Uncompahgre apply to the national forest lands. Jurisdictional disputes, whether over hunting and fishing, mineral extraction, or criminal matters, will continue to arise on these lands, whether or not the State remains bound by *Ute Indian Tribe*. The lands in question are vast in size, and of significant public interest and importance, justifying a full consideration of the jurisdictional issues in light of *Hagen*. As with the other lands, the Tribe is seeking a permanent injunction against any future exercise of state jurisdiction, a drastic remedy that requires application of current law, not application of a case that has been "effectively overruled."

F. *The Issues of Subsurface Estates, Dependent Indian Communities, and Townsites Are Not Before the Court.*

At pages 46-50 of its brief, the Tribe contends that its' alleged ownership of certain subsurface estates and townsite common areas within the former Uintah Reservation boundaries entitles it to assert jurisdiction over those areas. The Tribe similarly claims that certain towns and neighborhoods within the Uintah Basin are "dependent Indian communities" and thus Indian country under 18

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[10] The United States told the District Court, in this very same injunction proceeding: "[T]he Utah Supreme Court held in *State v. Perank* . . . that the exterior boundaries of the Uintah and Ouray Indian reservation have been disestablished."

U.S.C. § 1151(b). Whatever the merits of these claims, they are not before the Court of Appeals. In the pre-trial order executed in the District Court, the Tribe stipulated that such issues would be deferred for later consideration, and the District Court did not rule upon them. Indeed, the State does not believe that these issues are even properly before the District Court, since the complaint filed by the Tribe in the District Court addresses only the external reservation boundaries, and raises none of these issues. In any event, the Court of Appeals need not consider these issues now.

IV.

THE COURT OF APPEALS SHOULD HOLD THAT THE FORMER UNCOMPAHGRE RESERVATION HAS BEEN DISESTABLISHED

A. *The Tribe Has Made No Substantive Arguments Supporting the Continued Existence of the Uncompahgre.*

In addition to the claims of the parties concerning the Uintah reservation, the State has asked the Court of Appeals to withdraw its *Ute Indian Tribe* mandate as it concerns the former Uncompahgre Reservation. Although neither *Perank* nor *Hagen* explicitly dealt with the Uncompahgre, the Supreme Court's reasoning in *Hagen* destroys any remaining viability that the *Ute Indian Tribe* might have had with regard to the Uncompahgre.

In its response to the State's motion to recall the mandate, the Tribe makes *no* substantive arguments concerning the continued existence of the Uncompahgre. Rather, it argues that *Hagen* did not specifically undermine *Ute Indian Tribe* with regard to *Hagen*, and that considerations of finality should lead the Court of Appeals to leave its prior ruling undisturbed. Ute Tribe Memorandum In Opposition to Appellants' Motion to Recall Mandate at 13-14.

The Tribe is incorrect on both counts. First, the Court of Appeals' decision concerning the Uncompahgre in *Ute Indian Tribe* was wholly based upon the premise that *Solem* had changed the law, so that language restoring reservation lands to the public domain was insufficient to indicate congressional intent to disestablish. *See Ute Indian Tribe*, 773 F.2d at 1095 ("Ultimately, I interpret *Solem* to hold that "public domain" language standing alone is insufficient to support a finding of explicit congressional intent to disestablish"). The *Hagen* court expressly rejected this reasoning. 114 S. Ct. at 967 ("the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation").

Aside from the now-rejected *Solem* analysis, there is no legal basis for a finding that the Uncompahgre still exists, and the Tribe has failed to provide one. The State's principal brief cites the succinct analysis of the United States in a brief filed in *Andrus v. Utah*, 446 U.S. 500, 100 S.Ct. 1803, 64 L.Ed. 458 (1980) that there could be no reasonable conclusion—even in light of the United States' trust responsibilities to the Tribe—except that the Uncompahgre no longer exists.[11] In its brief as amicus curiae before this Court, the United States has reiterated its prior position that the Uncompahgre was disestablished in 1897. United States Brief at 18-19.

The Ute Tribe would permanently and prospectively enjoin the State from legitimate exercises of jurisdiction in a vast area, unpopulated by Indians and containing virtually no Indian lands, on the basis of a decision dis-

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[11] The State wishes to draw the attention of the Court to a typographic error in the portion of its principal brief dealing with the Uncompahgre. At pp. 36-37, the State quotes the United States' statement in proceedings on certiorari from the *Ute Indian Tribe* decision. The quotation as it appears in the brief states that the 1897 Act [Act of June 7, 1897, 30 Stat. 62] established the Uncompahgre. In fact, the United States stated that the 1897 Act *disestablished* the Uncompahgre. *See* Aplt. App. Tab R, pp.316-319.

puted by the United States, "effectively overruled" by the U.S. Supreme Court, and not even defended by the Tribe on a substantive basis. This Court should not perpetuate an erroneous decision any longer. It should withdraw its mandate concerning the Uncompahgre, and affirm the disestablishment of that reservation.

DATED this 4th day of September, 1996.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DUCHESNE COUNTY, a political subdivision of the State of Utah, UINTAH COUNTY, a political subdivision of the State of Utah,
Petitioner,
v.
UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah, a federally recognized tribe of Indians,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS DUCHESNE COUNTY AND UINTAH COUNTY, UTAH

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SUPPLEMENTAL BRIEF OF PETITIONERS DUCHESNE COUNTY AND UINTAH COUNTY, UTAH

This Supplemental Brief of Petitioners, Duchesne County and Uintah County, Utah, is submitted in light of the recent decision of this Court in *South Dakota v. Yankton Sioux Tribe,* 66 U.S.L.W. 4092 (U.S. Jan. 26, 1998) (No. 96-1581), pursuant to Sup. Ct. R. 15.8.

ARGUMENT

I. THE DECISION OF THIS COURT IN *YANKTON SIOUX TRIBE* CONFIRMS THAT *UTE INDIAN TRIBE* MISCONSTRUED *HAGEN.*

A. Introduction.

The petition in this case presents this Court with an opportunity to assess the decision of the Tenth Circuit Court of Appeals in *Ute Indian Tribe v. Utah,* 114 F.3d 1513 (10th Cir. 1997), Pet. App. 1a-36a. The *Ute Indian Tribe* decision misconstrues *Hagen v. Utah,* 510 U.S. 399 (1994) to preserve historic reservation boundaries, contrary to the submissions in *Hagen* and contrary to the related precedent of this Court. As a result, the "reservation" area resurrected in *Ute Indian Tribe encompasses tens of thousands of acres of fee lands that are not owned or populated by members of the Ute Indian tribe. But see Yankton Sioux Tribe,* 66 U.S.L.W. at 4096 ("contradicts the common understanding of the time: that tribal ownership was a critical component of reservation status").

As a practical matter, the response of the State of Utah affirmatively establishes the need for this Court to exercise discretionary jurisdiction in this case. It does so by confirming in no uncertain terms the "jurisdictional chaos" that will result if the Tenth Circuit's decision is allowed to stand:

> The *Tribe* and the *Counties* have aptly described the present situation as one of "*jurisdictional chaos,*" characterized by *many* categories of land ownership

> and a wide variety of unanswered jurisdictional questions. For example, just to determine jurisdiction in an arrest for criminal activity, both a *survey* to determine the exact location of the crime *and* a *title search* to establish the *past* and *present* ownership of the land are often necessary.

Resp. of the State of Utah to Req. for Statement of Position at 3, *Duchesne County and Uintah County, Utah v. Ute Indian Tribe* (No. 97-570) (emphasis added).[1]

The extent of the unprecedented and unworkable nature of this decision is also exemplified in the manner in which it has been used to frustrate the mandate of this Court in *Hagen*. To date, the United States District Court has continued to enjoin the Counties from implementing (except for felonies) the *Hagen* mandate, even with respect to the homestead and townsite lands resolved by the *Ute Indian Tribe* decision, as we have previously recounted. Pet. for Writ of Cert. at 1-2, 5-9; Reply Br. of Pet'rs at 1, 2; Pet'rs Reply to Resp. of the State of Utah at 9 n. 6; *Ute Indian Tribe* (No. 97-570).

This Supplemental Brief is submitted to support the argument that the recent decision of this Court in *Yankton Sioux Tribe* confirms that *Ute Indian Tribe* misconstrued *Hagen*.

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[1] As previously noted:

> The federally funded and tribally assisted tract by tract *title* opinions and corresponding *mapping* processes, involve "28" different land categories and hundreds of thousands of acres of land. No one can accurately predict when such a project will be complete. *See also* the related argument set forth in the brief of *amici* States, Br. for the States of California, *et al.* in Supp. of Pet'rs at 12-15. . . .

Pet'rs Reply to Resp. of the State of Utah at 4 n.2, *Ute Indian Tribe* (No. 97-570). *But see Yankton Sioux Tribe*, 66 U.S.L.W. at 4096-4097 ("we give it a 'sensible construction' that avoids this 'absurd conclusion.' See *United States v. Granderson*, 511 U.S. 39, 56 (1994) (internal quotation marks omitted)").

B. *Yankton Sioux Tribe* Undermines the Reservation Boundary Premise of *Ute Indian Tribe* in Two Respects.

From the beginning, Duchesne County and Uintah County, Utah, have respectfully requested that consideration of this petition be deferred until after this Court had an opportunity to view the issue in light of the briefing and oral argument in *Yankton Sioux Tribe*. Pet. for a Writ of Cert. at 30; Reply Br. of Pet'rs at 10; Pet'rs' Reply to Resp. of the State of Utah at 10; *Ute Indian Tribe* (No. 97-570). In addition, these Counties submitted an *amici curiae* brief in support of the State of South Dakota and the South Dakota county in that case. Br. of Duchesne County, Utah and Uintah County, Utah, *Amici Curiae*, in Supp. of Pet'r, State of South Dakota, *Yankton Sioux Tribe* (No. 96-1581).

In every respect but one, the decision of this Court in *Yankton Sioux Tribe* unequivocally reflects the understanding and analysis of this Court's precedent as set forth in the briefs of the State and Counties in *Yankton Sioux Tribe*. The one point that remains less than clear, however, has prompted this Supplemental Brief. That point is found on the last page of this Court's opinion. It concerns the "limited" nature of the *Yankton Sioux Tribe* holding and the statement that the "holding in *Hagen* was similarly limited":

> [C]aution us, however, to *limit* our holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation. We need not determine *whether Congress disestablished the reservation altogether* in order to resolve this case, and accordingly *decline* to do so. Our holding in *Hagen* was similarly *limited*. . . .

Yankton Sioux Tribe, 66 U.S.L.W. at 4100 (emphasis added).

As a preliminary matter, it should be pointed out that the Counties do not, of course, question the validity of

this Court's determination in Yankton Sioux Tribe to limit the scope of the decisions in this manner. In South Dakota, the question of "whether Congress disestablished the reservation altogether" is expected to be decided in short order, on remand or in some related case. *Id.* Moreover, the express admonition of the Court that *Yankton Sioux Tribe* (and *Hagen*) did "not determine" this "disestablished the reservation altogether" issue will allow the parties in South Dakota to analyze the issue in light of the precedent of this Court, including *Yankton Sioux Tribe*. *Id.* Certainly, no one will now be able to argue that *Yankton Sioux Tribe* actually decided that issue.

Unfortunately, that was not the case when the Tenth Circuit considered *Hagen* and decided *Ute Indian Tribe*, which is the subject of this petition. And the problem lies in the manner in which the Tenth Circuit will likely repeat its misconstruction of what *Hagen* decided and its view of the *Hagen* limitation in the context of the *Ute Indian Tribe* opinion, at least in the absence of some additional guidance from this Court.

Without this guidance, if this petition is granted and the issue is remanded for further consideration in light of *Yankton Sioux Tribe*, in the Tenth Circuit the argument will now be made that because *Yankton Sioux Tribe* confirms the "limited" holding of *Hagen*, *Ute Indian Tribe* correctly resolves this case. In *Ute Indian Tribe*, the Tenth Circuit held:

> We do not, however, recall *Ute Indian Tribe III* in its entirety. To the extent that *Ute Indian Tribe III* decided matters not addressed in *Hagen*, finality requires those decisions to remain undisturbed. Thus, we modify our earlier judgment only to the extent that it *directly conflicts* with the holding in *Hagen*. . . . [T]o the extent that lands within the Reservation were unallotted, open for settlement under the 1902-1905 legislation, and not thereafter returned to tribal ownership. Accordingly, we hold that our prior judgment in *Ute Indian Tribe III* should be, and is

> now, modified to the extent that lands within the original reservation boundaries were unallotted, opened to non-Indian settlement under the 1902-1905 legislation, and not thereafter returned to tribal ownership. . . . In this case, we must determine the extent to which *Hagen directly conflicts* with our earlier conclusion that all of the above categories of non-trust lands remain within Indian country [erroneous conclusion that public domain statute did not affect reservation status] . . . . [T]he diminishment was only "with respect to those lands" that had been restored to the public domain under the 1902-1905 legislation. . . . We therefore conclude that *Hagen* did not erase the boundaries of the Uintah Valley Reservation and that the current "limits of [the] reservation" thus embrace the three categories of non-trust lands at issue.

Ute Indian Tribe, 114 F.3d at 1527-1530, Pet. App. 27a-35a (emphasis added).

In *Yankton Sioux Tribe*, this Court did not cite *Ute Indian Tribe*. Nevertheless, at first glance, to the extent that *Yankton Sioux Tribe* substantiates that the holding in *Hagen* was "limited" to unallotted lands, the Tenth Circuit's understanding of *Hagen* and the direct conflict *appears* to be confirmed. *Yankton Sioux Tribe*, 66 U.S.L.W. at 4100. On closer analysis, however, that portion of the *Ute Indian Tribe* holding directed to *Hagen* and reservation boundaries is now demonstrably incorrect.

In fact, *Yankton Sioux Tribe* undermines the reservation boundaries premise of *Ute Indian Tribe* in two respects. First, on its face, *Hagen* made clear that the historical Uintah reservation boundary was extingiushed. The Court set forth the following quotation in the text of *Hagen* in support of its conclusion, including the bracketing and special emphasis:

> Contemporary historical evidence supports our conclusion . . . . Inspector McLaughlin explained the effect of these recent developments to the Indians

> living on the Reservation. . . . "'You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but Congress has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation.*'" . . . Inspector McLaughlin's picturesque phrase reflects the contemporaneous understanding. . . .

Hagen, 510 U.S. at 416-417 (quoting and adding emphasis to Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians and Uintah Agency, Utah, From May 18, to May 23, 1903).

Importantly, in *Yankton Sioux Tribe* this Court repeated the point with respect to the historic "outside boundary" of the Uintah reservation:

> Cole's vivid language and entreaty to "break down the barriers" are reminiscent of the "picturesque" statement that Congress would "pull up the nails" holding down the outside boundary of the Uintah Reservation, which we viewed as evidence of diminishment in *Hagen*, 510 U.S. at 417.

Yankton Sioux Tribe, 66 U.S.L.W. at 4098.

If the historic reservation boundary had not been extinguished, the unallotted public domain lands in *Hagen* would still be 18 U.S.C. 1151(a) Indian country. This Court's precedent in *DeCoteau v. District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), cited with approval in both *Hagen* and *Yankton Sioux Tribe*, set forth this fundamental concept. This is the only way that this Court has ever recognized that lands can be "severed" from any reservation. *Yankton Sioux Tribe*, 66 U.S.L.W. at 4100. *See also United States v. Pelican*, 232 U.S. 442 (1914); *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v.*

Arnett, 412 U.S. 481 (1973); *Rosebud Sioux Tribe*, 430 U.S. 584; *Solem v. Bartlett*, 465 U.S. 463 (1984); *Hagen v. Utah*, 510 U.S. 399 (1994); *Yankton Sioux Tribe*, 66 U.S.L.W. 4092. The analysis and holding in *Yankton Sioux Tribe* again confirms this understanding. *Yankton Sioux Tribe*, 66 U.S.L.W. at 4096.[2]

In contrast, *Ute Indian Tribe* expressly rejected this premise:

> In *Hagen*, the Supreme Court did not decide . . . erasing its *outer boundaries*. . . . *Hagen* did not erase the boundaries of the Uintah Valley Reservation.

Ute Indian Tribe, 114 F.3d at 1530, Pet. App. 34a-35a (emphasis added).

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[2] Even prior to the decision in *Yankton Sioux Tribe*, the Counties submitted this same argument:

> [T]he holding of the Tenth Circuit could not possibly be correct even if one were to assume *arguendo* that *Hagen* only decided the non-reservation status of the lands specifically restored to the public domain (and not the status of the lands that remained). Precedent (*DeCoteau* and *Rosebud*) establishes that non-reservation status of the restored lands in all instances is *necessarily* tied to the disestablishment of historic reservation boundaries and *Hagen* relied on that precedent. Even if *Hagen* was not intended to also resolve the status of the other lands that remained, it certainly cannot be maintained that *Hagen* intended *diminishment* in the *unprecedented* format adopted by the court of appeals. Nevertheless, this is what the court of appeals has erroneously decided that *Hagen held*. The State of Utah strongly disagreed with this view of *Hagen*.

Pet'rs Reply to Resp. of the State of Utah at 7 (No. 97-570). In addition, *see* the discussion in *Yankton Sioux Tribe* where this Court discusses the *Yankton Sioux Tribe*, *DeCoteau* and *Hagen* Acts and "diminishment," and then points out how the 1894 Act was "readily distinguishable from surplus lands Acts that the Court has interpreted as *maintaining* reservation boundaries." *Id.* at 4096 (emphasis added); ("Our touchstone to determine whether a given statute *diminished or retained* reservation boundaries. . . .") and ("The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the existing reservation boundaries were *maintained*.") *Id.* at 4096 (emphasis added).

Ute Indian Tribe never did recognize that extinguishment of historic boundaries and complete extinguishment of reservation status were separate issues. As a result, *Hagen* was misconstrued in *Ute Indian Tribe* and this argument is blurred throughout the substantive part of the decision. *Id.* at 1528-1531, Pet. App. 29a-36a.

Second, in the process of confirming the limitation in both *Yankton Sioux Tribe* and *Hagen,* this Court also clarified a related point in both decisions by explaining that the issue of "whether Congress disestablished the reservation altogether" was not decided in *Yankton Sioux Tribe* and that the holding in *Hagen* was "similarly limited." *Yankton Sioux Tribe,* 66 U.S.L.W. at 4100. As a result, any discussion of reduced reservation *boundaries* attributed squarely to *Hagen* presumes the continued existence of an 18 U.S.C. 1151(a) reservation in some form—the very issue that *Yankton Sioux Tribe* states was *not* decided in either *Yankton Sioux Tribe* or *Hagen.*

Ute Indian Tribe first makes this fundamental error in stating:

> Further, we agree [with the district court] that *Hagen's* only *effect* was to *reduce* . . . the *boundaries* of the Uintah Valley Reservation. . . .

Ute Indian Tribe, 114 F.3d at 1528, Pet. App. 29a (emphasis added).

In addition, *Ute Indian Tribe* compounds this same mistake by explicitly assuming the question not decided:

> The Court stated that the Uintah Valley Reservation had been "diminished"—*not* "disestablished," "eliminated," or "terminated." *Moreover,* the diminishment was only "with respect to those lands" that had been restored to the public domain under the 1902-1905 legislation.

Id. at 1530, Pet. App. 34a-35a (emphasis added).

In other words, *Hagen* did *not* hold that the boundaries of the historic Uintah Reservation were somehow reduced

to *exclude* only those lands actually restored to the public domain and, at the same time, somehow *modified* to *include* all other lands, as *Ute Indian Tribe* has decided. *Hagen* left the issue open and *Yankton Sioux Tribe* made this point perfectly clear. *Yankton Sioux Tribe,* 66 U.S.L.W. at 4100.

In the final analysis, *Ute Indian Tribe* did not adhere, as this Court did in *Yankton Sioux Tribe,* to the admonition of *DeCoteau*:

> Here, as in *DeCoteau*, we believe that Congress spoke clearly, and although "[s]ome might wish [it] had spoken differently . . . we cannot remake history." 420 U.S., at 449.

Id.

CONCLUSION

A strong argument can be made that *Hagen* intended the unresolved issue of "whether Congress disestablished the reservation altogether" to be limited to the "status" of 1.2 million acres of trust land. *Yankton Sioux Tribe,* 66 U.S.L.W. 4100. This was the basis upon which *Hagen* was submitted to this Court, as the Counties have repeatedly pointed out. A remand for further consideration of the issue in this context would resolve the issue consistent with the history of *Hagen.* It would also cure the unprecedented "jurisdictional chaos" this Court never intended to create in the first instance.

In oral argument in *Yankton Sioux Tribe*, on December 8, 1997, the United States unequivocally conceded that unless this Court accepted their position, the remaining reservation in the Yankton area, if any, would be similarly limited to trust lands. Tr. of Oral Argument at 49-52, *Yankton Sioux Tribe* (96-1581). The next month, on January 30, 1998, the United States ignored that concession and completely reversed its position. On that date, the United States submitted a "Jurisdictional Memorandum" in a South Dakota criminal case that urges the court to apply the rationale and result of *Ute Indian Tribe* in

the Yankton area (admitted "jurisdictional chaos"). Jurisdictional Memorandum, *United States v. Rainbow*, No. CR. 97-40086-01 (D.S.D. Jan. 30, 1998). Apart from other objectionable features, this entire process belittles this Court's venerable precedent in *DeCoteau* and *Rosebud*.

The petition for a writ of certiorari should be granted and this Court should fashion some type of appropriate relief. The need for special clarification is supported by the "jurisdictional chaos" in the area that all parties, including the Ute Indian tribe and the State of Utah, recognize and concede. It is further supported by the submission of the United States in the Tenth Circuit Court of Appeals that this case involves issues of "continuing public importance." Br. for the United States at 13, *Ute Indian Tribe* (No. 96-4073).

Alternatively, because the United States has still elected not to express its views to this Court regarding *Ute Indian Tribe's* construction of *Hagen*, we respectfully suggest that the United States be invited to do so at this time. The United States, at the very least, should explain how, in this case, it could tell this Court one thing and then tell the court below a different story.

Respectfully submitted,

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